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No. _____

In The

Supreme Court of the United States

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,

Petitioners,

v.

WISCONSIN BELL, INC., d/b/a
AMERITECH WISCONSIN, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 13, 2000

159 pp

QUESTIONS PRESENTED

Arising under the provisions of the Telecommunications Act of 1996, this case exemplifies three state commission actions—enforcing interconnection agreements, rejecting a Statement of Generally Available Terms ("SGAT"), and approving an interconnection agreement—relating to carrier interconnection activities under the Act. This case presents critical questions about the correct interpretation of the Act's judicial review provisions and whether those provisions violate proper treatment of state powers and sovereign immunity under the United States Constitution.

1. Pursuant to its Article I Commerce Clause power, can Congress provide in § 252 of the Act that a state commission constructively waives its Eleventh Amendment immunity because Congress explicitly or implicitly preempted all state action and a commission purportedly and unequivocally accepts a "gratuity" of federal jurisdiction if it acts, even though the Act does not contain a clear and unequivocal waiver of such immunity?

2. Assuming constructive waiver is valid, is a state choice voluntary and consistent with the Tenth Amendment when the Act requires the state commission to effectively choose between risking abdication of its ongoing state law regulatory responsibilities and waiving its Eleventh Amendment immunity?

3. Under a correct construction of § 252(e), has Congress preempted all state action, including state court review of state commission enforcement of previously-approved interconnection agreements?

4. May *Ex parte Young* be properly invoked to compel state commissioner compliance with the Act, even though the Act's scheme limits a federal court's review to determining only SGAT or interconnection agreement compliance with the Act, and state courts are already available to correct state commissions that err in applying the Act and related rules?

PARTIES TO THE PROCEEDING

The petitioners are the Public Service Commission of Wisconsin, and Cheryl L. Parrino, Daniel J. Eastman, and Joseph P. Mettner, in their official capacities as commissioners of the Public Service Commission of Wisconsin. Commissioner Cheryl L. Parrino was succeeded by Commissioner Ave M. Bie, effective August 24, 1998, and Commissioner Daniel L. Eastman was succeeded by Commission John H. Farrow, effective July 20, 1998. This change of public officers was previously noted to the Seventh Circuit pursuant to Fed. R. Civ. P. 43.

Respondents in the relevant appeals involving the above-named petitioners are Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin; MCI Telecommunications Corporation; MCIMetro Access Transmission Services, Inc.; Time Warner Communications of Milwaukee L.L.P., AT&T Communications of Wisconsin, Inc., TCG Milwaukee, Inc., the United States of America; and the Federal Communications Commission.

Because the Seventh Circuit Court of appeals treated Appeal No. 98-2127 as consolidated with five appeals involving the Wisconsin Commission for purposes of argument and issuance of the opinion and judgment, Petitioners are also identifying as additional respondents the following parties in Appeal No. 98-2127: Illinois Bell Telephone Company, d/b/a Ameritech Illinois, Illinois Commerce Commission, and Terry Harvill and Ruth K. Kretschmer, in their official capacities as Commissioners of the Illinois Commerce Commission, and not as individuals.

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JURISDICTION

The opinion of the Court of Appeals was issued on July 24, 2000, and judgment was entered that same day. This Petition for Certiorari is being filed within 90 days of entry of judgment. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). *See also* SUP. CT. R. 12.4. Seth P. Waxman, the Solicitor General, and Christopher J. Wright, General Counsel of the Federal Communications Commission, are among the parties served, per SUP. CT. R. 29.4.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case concerns the interpretation and application of the following constitutional, statutory, and regulatory provisions, all of which are reprinted in the Appendix.

1. U.S. CONST. art. III, § 2. App. to Pet. 95a.
2. U.S. CONST. amend. X. App. to Pet. 95a.
3. U.S. CONST. amend. XI. App. to Pet. 95a.
4. Telecommunications Act of 1996, as enacted, §§ 251 and 252, 47 U.S.C. §§ 251 and 252. App. to Pet. 96a-112a.

5. Telecommunications Act of 1996, Pub. L. 104-104, § 601(c)(1), 110 Stat. 56, 143 (1996).
6. 47 C.F.R. §§ 51.801 and 51.807(b). App. to Pet. 113a-114a.
7. WIS. STAT. §§ 196.41, 227.52, 227.53(1) (intro.) and 227.57 (1997-98). App. to Pet. 114a-116a.

STATEMENT OF THE CASE

This petition originates in three different types of state commission action relating to interconnection under 47 U.S.C. § 252, as enacted in the Telecommunications Act of 1996 ("Act").[1] In each case, the Public Service Commission of Wisconsin ("PSCW") asserts that it has not waived state sovereign immunity under the Eleventh Amendment, and that whatever purported choice it had to "opt in" or "opt out" of the procedures of § 252 was not voluntary but effectively coerced, in contravention of the Tenth Amendment. The PSCW also contends that state court review of an SGAT decision or agency decision enforcing a previously-approved interconnection agreement is plainly not preempted under a proper construction of § 252. Lastly, the PSCW Commissioners contend that they are not appropriately subject to injunction under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), either as historically applied or as recently constrained by *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

These cases involving different underlying agency decisions were joined for decision before the district court because of common legal defenses. App. to Pet. 51a-53a. In

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[1] Pub. L. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of 47 U.S.C.). Hereinafter, "§ 251" or similar citation will denote the section of Title 47, United States Code, except as otherwise indicated.

each case, district court jurisdiction was asserted based on § 252, as well as other statutes not relevant here. Motions to dismiss based on Eleventh Amendment immunity were advanced by the PSCW in the first two appeals noted below, and by way of affirmative defense in the arbitration case, which is the basis of the last three appeals noted below. With court permission, the PSCW subsequently amended its pleadings in all three cases to raise a Tenth Amendment defense. The PSCW's underlying decisions are not included in the appendix because the lower courts did not address the merits of the decisions of the PSCW.[2]

The Appeals.

Appeal No. 99-2806 ("enforcement case") involves a PSCW decision that Wisconsin Bell, Inc., d/b/a Ameritech Wisconsin ("Ameritech"), failed to perform under its previously-approved interconnection agreements with TCG Milwaukee, Inc. ("TCG"), and Time Warner Communications of Milwaukee, L.P. ("TW"), by refusing to pay reciprocal compensation for traffic terminating with Internet service providers served by TCG and TW. Reciprocal compensation is the payment two carriers give each other for the use of the other's local exchange network to terminate telecommunications. The Commission determined that the identified Internet traffic transferred by Ameritech for termination by TCG and TW was covered by the local traffic provisions in the interconnection agreements under both federal and state law and ordered Ameritech to pay the money due under the agreements.

Appeal No. 99-2811 ("SGAT case") is Ameritech's appeal of a Commission decision rejecting Ameritech's statement of generally available terms and conditions. Section 252(f) sets

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[2] Pursuant to direction of the Clerk of the Supreme Court of the United States, copies of the PSCW's decisions will be lodged with the Clerk.

forth SGAT requirements and describes state commission review of an SGAT filing. PSCW approval of an SGAT is required for Ameritech to demonstrate to the Federal Communications Commission ("FCC") that sufficient terms and conditions for competitive entry have been established so that Ameritech should be permitted under § 271 to provide in-region, interLATA long distance toll service. The PSCW rejected Ameritech's SGAT or tariff offerings, which were filed with the PSCW as required by Wisconsin law.

Appeal Nos. 99-2805, 99-2873, and 99-2992 ("arbitration case"), filed by Ameritech, MCI, and the United States as an intervenor, respectively, relate to separate appeals of Ameritech and MCI Telecommunications Corp. ("MCI"),[3] which were consolidated by the district court. Asserting seven different claims between them, Ameritech and MCI seek a determination as to whether their arbitrated interconnection agreement, approved by the Commission on December 8, 1997, complies with the Act. The United States intervened in opposition to the PSCW's affirmative defense of sovereign immunity.

The Opinions of the United States District Court for the Western District of Wisconsin.

The district court ruled in favor of the PSCW by determining that the PSCW had not constructively waived its Eleventh Amendment immunity. Furthermore, based on its reading of *Seminole Tribe*, the district court concluded that § 252 qualified as a limited statutory scheme that could not be overridden by judicial application of *Ex parte Young* to compel the Commissioners to adhere to federal law. Accordingly, the district court dismissed the PSCW and the PSCW Commissioners as parties. The district court did not

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[3] "MCI" shall also be deemed to include MCIMetro Access Transmission Services, Inc., an affiliated co-plaintiff of MCI Telecommunications Corp.

specifically address the PSCW's Tenth Amendment defense. Concluding its review, the district court dismissed the cases in their entirety because of the Seventh Circuit's rulings that state commissions and their commissioners are parties to federal court actions reviewing their decisions. *Wisconsin Bell, Inc. v. Public Serv. Comm'n*, 57 F. Supp. 2d 710, 717-18 (W.D. Wis. 1999)(*Wisconsin Bell II*)(citing *Illinois Bell Tel. Co. v. WorldCom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999) and *MCI Telecomm's Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, *amended*, 183 F.3d 558 (7th Cir. 1999). App. to Pet. 91a-93a. In the preceding case involving MCI, the Seventh Circuit granted rehearing, 183 F.3d 567 (7th Cir. 1999), and subsequently affirmed its holding, 222 F.3d 323 (7th Cir. 2000), issuing the opinion that is the subject of this petition.

In its first decision in November, 1998, under then-controlling precedent in *Parden v. Terminal Railway of the Alabama State Docks Dep't.*, 377 U.S. 184 (1964), and *Employees of the Dep't. of Public Health & Welfare v. Dep't. of Public Health & Welfare*, 411 U.S. 279 (1973)(*Employees*), the district court determined that the Telecommunications Act of 1996 did not obtain a valid voluntary waiver of immunity from the states, even though Congress' intention to require judicial review in federal district court was evident. The district court advanced three reasons for its holding. First, the Act preserved the states' role as the primary regulators of local telephone service, according to the district court, and *Employees* precluded application of the constructive waiver doctrine "when the federal government amends or enacts a law making a state subject to suit merely by continuing in existing activities to protect its citizens." *Wisconsin Bell, Inc, v. Public Serv. Comm'n*, 27 F. Supp. 2d 1149, 1158 (W.D. Wis. 1998) (*Wisconsin Bell I*) (citing *Employees*, 411 U.S. at 296 (Marshall, J., concurring)). Second, staying out of approving voluntarily negotiated interconnection agreements is not an option for a state commission because the agreements would then go into effect without any government oversight, and, third, staying out of the interconnection

process is not a "realistic option" as a state commission would be abandoning its mandate to protect the public interest. App. to Pet. 65a-67a.

The district court also held that *Ex parte Young* doctrine did not apply. Because § 252 sets forth Congress' scheme for "limited review," and that scheme allowed for adequate correction of errors to protect federal rights without subjecting individual commissioners to injunction, *Seminole Tribe* precluded application of *Ex parte Young*. *Wisconsin Bell I*, at 1161. App. to Pet. 68a-74a.

Before issuing a second opinion, the district court determined that it had to account for the Supreme Court decision in *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), and the Court of Appeals' ruling in *MCI Telecomm's Corp.*, 168 F.3d at 315 (determining that state commission participation in the federal § 252 procedures amounts to a constructive waiver of Eleventh Amendment immunity). In its second opinion, the district court cited *College Savings* as controlling precedent that compelled dismissal of the suits against the PSCW and the PSCW Commissioners. The district court determined that, while some apparent constructive waivers continued under *College Savings*, the context in which they were preserved was not the same as that of the Telecommunications Act of 1996:

> [T]here is no arguable basis to a claim that equates a gift with a state's participation in the act's cooperative federalism (supervising the regulation of local telephone carriers in the state). . . . A state's continued regulation of local enterprise (local telephone carriers) is an "otherwise permissible activity" that can yield no inference as to a state's motivation for doing it.

Wisconsin Bell II, at 715. App. to Pet. 87a. The district court affirmed its prior ruling regarding the inapplicability

of *Ex parte Young* and dismissed the PSCW and the PSCW Commissioners in light of its rulings. The appeals filed by the carriers and the United States asserted Court of Appeals' jurisdiction under § 252 and 28 U.S.C.S. §§ 1331, 1337, 2201 and 2202 (Law. Co-op. Supp. 2000).

The Opinion of the United States Court of Appeals for the Seventh Circuit.

The carriers and the United States asserted that the PSCW waived its sovereign immunity by voluntarily administering the procedures under § 252, and that the individual commissioners could be enjoined under *Ex parte Young*. The carriers further argued that the cases could proceed even if neither the PSCW nor the individual commissioners were present as defendants. The United States asserted that the state commission could not exercise regulatory authority if judicial review is not available.

The Seventh Circuit reversed the district court and held that the PSCW, in exercising powers "delegated" to it by Congress in § 252, accepted a "gratuity" of federal jurisdiction to "share in the regulation of the telecommunications industry"—and consequently "agreed" to the condition that it waived its sovereign immunity. *MCI Telecomm's Corp v. Illinois Bell Tel. Co.*, 222 F.3d 323, 348 (2000) (*MCI*). App. To Pet. 48a. The Court of Appeals further held that these "suits are straightforward *Ex parte Young* cases" because the carriers alleged ongoing wrongdoing and sought only prospective equitable relief. *Id.* at 345. App. To Pet. 41a. In the view of the Court of Appeals, the more recent limitations of *Seminole Tribe* and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997), do not preclude application of *Ex parte Young*.

Because the Seventh Circuit held that state commissions could be sued in federal district court, it did not address Rule 19(b) arguments. *MCI*, 222 F.3d at 336 n.5. App. to Pet. 23a. The court affirmed the lower court decision in Appeal No. 98-2127 involving Illinois, and reversed and

remanded the other five appeals involving Wisconsin. A more detailed review of the court's rationale follows.

Constructive Waiver: The Seventh Circuit commenced its analysis by determining that § 252(e)(6) should be read broadly to include enforcement of previously-approved interconnection agreements within the scope of federal district court jurisdiction. *Id.* at 337-38. App. to Pet. 25a-27a. The effect of this determination was to resolve any statutory language issues associated with the enforcement case, Appeal No. 99-2806, and permit the court to turn to the constitutional and *Ex parte Young* issues.

Citing *College Savings*, 527 U.S. at 672, and *Seminole Tribe*, 517 U.S. at 72, the Seventh Circuit acknowledged that Congress could not have abrogated state sovereign immunity in the Act. *MCI*, 222 F.3d at 338. App. to Pet. 27a. However, the Seventh Circuit then determined that "constructive waiver" is still extant because *College Savings* "simply held that states cannot 'constructively' waive their immunity by being forced by Congress to choose between preserving their sovereign immunity and engaging in an 'otherwise lawful activity.'" *Id.* at 339. App. to Pet. 30a. It viewed *College Savings* as simply closing the "forced waiver" (emphasis added) loophole in *Parden*. *Id.* at 340. App. to Pet. 32a.

Turning to the issue of whether there was a valid waiver, the Seventh Circuit determined first that Congress adequately expressed in § 252 its intention to provide for federal court review of any "regulatory determination" made under the section, whether by a state commission or the FCC. *Id.* at 341. App. to Pet. 33a. Citing the structure of the statute itself, the remedy of FCC action if a state commission does not act, and the provisions for federal court review in § 252, the Court of Appeals found that Congress had "delegated" to the state commissions the opportunity to participate in a federal regulatory function "on the condition that their participation be reviewable in federal court." Congress, therefore, had satisfied the

requirement that it "clearly state that participation entailed a waiver of immunity from suit in federal court." *Id.* at 341. App. to Pet. 34a.

The second part of the analysis focused on whether the states made a clear declaration that they desired to waive their immunity. Agreeing with the Tenth Circuit, the Seventh Circuit held that the state commissions "voluntarily waived" their immunity by "accepting the federal government's invitation to act as regulators of the local telephone market in accordance with sec. 252" of the Act. *Id.* at 342. App. to Pet. 35a. In other words, "Congress had the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take." *Id.* App. to Pet. 35a. The court noted that Congress "could—and did—take over a part of the telecommunications industry in accordance with the Commerce Power." *Id.* at 344. App. To Pet. 39a. In addition, although Congress could not abrogate state sovereign immunity by exercising Article I powers, or commandeer state regulatory agencies with legislation forcing them to regulate on behalf of Congress, "these limitations on congressional power do not prohibit Congress from obtaining a state's voluntary consent to federal jurisdiction." *Id.* at 343. App. to Pet. 36a. The court rejected the notion that the state commissioners did not have power to waive state sovereign immunity: "By accepting the grant of regulatory power offered by Congress, and by allowing the state commissions to exercise that power, Illinois and Wisconsin cannot contend now that they are not bound by the conditions attached to that grant of power." *Id.* at 344 n.10. App. to Pet. 39a.

In the instant situations, the court held, the authority of the state commissions to act "was derived from provisions of the Act and not from their own sovereign authority." *Id.* at 343. App. to Pet. 37a. Consequently, state regulation was no longer an "otherwise permissible activity" for states.

Congress' choice to give back some of the power could have conditions that the "[s]tates are free to accept or reject . . . if they want a continued role in regulating this segment of the local telephone service market." *Id.* at 344. App. to Pet. 39a-40a.

Ex parte Young: The Seventh Circuit further held that *Ex parte Young* furnished an independent basis for its decision. The court rejected the argument that, if there were any violations, they occurred in the past: "The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations with federal law." *Id.* at 345. App. to Pet. 41a. The relief sought was prospective in nature. These two factors made the cases "straightforward" *Ex parte Young* cases. *Id.* App. to Pet. 41a.

The court found the comparison by the PSCW commissioners of § 252 to the "detailed remedial scheme" in *Seminole Tribe* to be "flawed." The court stated that § 252 did not manifest Congressional "intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations." *Id.* at 346. App. to Pet. 42a. Section 252(e)(6) did not impose any limits on the court's powers "in stark contrast with the court's powers to impose what the Supreme Court called a 'modest set of sanctions' under the statute at issue in *Seminole Tribe*." *Id.* at 346. App. to Pet. 42a-43a. The court reviewed the negotiation scheme for compacts between a state and a tribe under the Indian Gaming Regulatory Act (IGRA), 25 U.S.C. § 2701-2721 (1999), and observed that, unlike the limited liability imposed upon a state under IGRA, "Congress has not limited the court's remedial power under subsection 252(e)(6) . . . ." Indeed, the section "is silent as to how a district court would enforce its rulings under that section." *Id.* at 347. App. to Pet. 45a.

Lastly, the court held that a state's regulation of telecommunications providers did not implicate "special

sovereignty interests" as fundamental as those in *Coeur d'Alene Tribe*. The sovereignty interest of the state was actually "derived solely from the regulatory role Congress has bestowed upon the states." *Id.* at 348. App. to Pet. 46a-47a.

REASONS FOR GRANTING THE WRIT

The questions presented in this case are of profound importance, not only for implementation of the federal regulatory scheme in the Telecommunications Act of 1996, but also for definition of the boundary between federal power under the Commerce Clause and state power retained under the Tenth and Eleventh Amendments.

The questions presented in this case are at the intersection of three areas of unsettled jurisprudence. The Supreme Court should not let the lower court's holding become a significant precedent; the issues should instead be accorded an authoritative ruling by this Court.

The first unsettled question is whether constructive waiver of Eleventh Amendment immunity is viable with respect to a field of regulation in which Congress has acted under its Article I Commerce Clause powers but without fully preempting all state regulation and without providing an "unequivocal declaration" that state Eleventh Amendment immunity is to be waived. Under the Seventh Circuit's ruling, a state may be engaged in its traditional regulation of telecommunications interconnection, yet find that such exercise of its sovereign powers creates a waiver under § 252 of the Act that nowhere specifies that waiver of Eleventh Amendment immunity could occur. The Supreme Court in *College Savings* required more than a continued presence in a commercial activity before triggering a waiver of immunity, even where a federal statute expressly removed state Eleventh Amendment immunity and expressly stated that states were suable persons. In contrast, the Seventh Circuit's holding would permit constructive

waiver when a state exercises its more fundamental sovereign regulatory powers, thereby according the states even less dignity than if they were private entrepreneurs under a statute with no similar express provisions.

The foregoing issue is intertwined with a related Tenth Amendment question. If Congress fails to preempt state regulation in a field, does the extraction of a constructive waiver—if indeed permissible—cross into forbidden coercion violating the sovereign dignity of the states? Coercion exists because a state is forced to choose between enforcing its own state laws—even those consistent with federal law—and waiving its Eleventh Amendment immunity. This "Hobson's choice" is a result of the Congressional enactment of the Act under the Commerce Clause just six weeks before this Court's ruling in *Seminole Tribe* invalidating abrogation of state sovereign immunity under a Commerce Clause enactment. Consequently, the Act's judicial review provision in § 252—if constructive waiver is valid—interferes with the states as sovereign states by coercing one choice, i.e., to administer the Act. This coercion exceeds the limits of "encouragement" under cooperative federalism, as delineated in *New York v. United States*, 505 U.S. 144, 167-68 (1992) by effectively commandeering state commissions for federal objectives.

The second unsettled area of law is an issue of first impression, specifically, interpretation of the scope of the § 252 judicial review provisions within the Act's overall scheme for the development of local telecommunications competition. Only FCC rulemaking authority, not the judicial review provisions of § 252, was reviewed in *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366 (1999) (*AT&T Corp*). A Court ruling in these cases would complete judicial scrutiny of landmark legislation regarding telecommunications.

The third unsettled doctrinal area is the nature of a "detailed scheme" that justifies a *Seminole Tribe* exception to enjoining allegedly erroneous state officer conduct under *Ex parte Young*. The Seventh Circuit holding asserts that the

level of the detail of the scheme determines the preclusion of *Ex parte Young* under *Seminole Tribe*, so that a simple statutory remedy specified by Congress will not suffice to bar *Ex parte Young* relief, precisely because the remedy engages less than the full panoply of federal court powers. The district court held to the contrary, and petitioners agree, that the point of *Seminole Tribe's* restraint on *Ex parte Young* is whether Congress specified any scheme, be it simple or complex, to supplant resort to all federal court powers. This important issue regarding federal court powers alone justifies review by this Court.

The determination of this petition for certiorari will not just affect several pending court cases.[4] In the absence of express state legislative authorization, state commissions are faced with the question of whether they would waive state sovereign immunity if they continue to apply § 252 procedures, because petitions for arbitration regarding "second generation" interconnection agreements have already been filed. If a number of the state commissions choose, or are forced by law, to opt out of reviewing agreements and SGATs, arbitrating disputes in agreements and enforcing previously-approved agreements, in all likelihood the FCC—which is obliged to act in lieu of the state commissions—would not have the resources to

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[4] *GTE North, Inc., v. Strand*, 209 F.3d 909 (6th Cir. 2000), *petition for cert. filed*, (U.S. July 17, 2000) (No. 00-101); *MCI Telecomm's Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929 (10th Cir. 2000), *petition for cert. filed, docket number pending*, (U.S. Sept. 13, 2000); *BellSouth Telecomm's, Inc. v. North Carolina Util. Comm'n*, Nos. 99-1845 *et al.* (4th Cir. filed June 21, 1999) and *Bell Atlantic-Maryland, Inc. v. MCI WorldCom, Inc.* Nos. 99-2459, *et al.* (4th Cir. filed October 29, 1999), argued seriatim May 1, 2000; *AT&T Communications v. BellSouth Telecomm's, Inc.*, No. 99-30421 (5th Cir filed April 12, 1999); *MCI Telecomm's Corp. v. BellSouth Telecomm's, Inc.*, No. 00-13505FF (11th Cir. filed July 7, 2000). In addition, similar actions are pending in district courts across the country.

effectively handle potentially hundreds, if not thousands, of arbitrations and enforcement cases. The consequent delays and confusion would substantially frustrate Congress' objective in the Act to speedily introduce competition into local telecommunications markets.

If this Court were to reverse the Seventh Circuit, application of federal law in local telecommunications competition will not be frustrated as a matter of policy. State courts will be under the continuing unifying guidance of federal court decisions to date and the rules and orders of the FCC. Petitioners have all along acknowledged that their decisions applying Act procedures are subject to review by state courts, which this Court has frequently held are presumed to be competent to apply federal law. *See, e.g., Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 507 (1962) (acknowledging "the premise that nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law").

This petition presents questions that have substantial constitutional, statutory, and practical administrative ramifications. These questions need to be decided by the Supreme Court.

I. THE SEVENTH CIRCUIT'S CONSTRUCTIVE WAIVER HOLDING CONFLICTS WITH THE *COLLEGE SAVINGS* DECISION OF THIS COURT AND THE DETERMINATIONS OF TWO OTHER CIRCUITS.

The Seventh Circuit has held that Congress provided for constructive waiver of state Eleventh Amendment immunity as a condition to a state commission's using § 252 procedures to arbitrate interconnection agreements and to approve or reject an SGAT. It also extended the construction waiver to a state commission's enforcement of a previously-approved interconnection agreement on the premise that the power to create or approve an agreement

necessarily includes enforcement power. The unstated thrust of the Seventh Circuit's decision was to find a "voluntary" gift transaction between the federal government and the states in order to attach a waiver of immunity as a condition of the gift, thereby enabling application of the limited constructive waivers preserved by *College Savings'* continued acceptance of *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota v. Dole*, 483 U.S. 203 (1987).

The underlying gift-back concept, the "gratuity" or gift of federal jurisdiction from Congress to the states, however, rests upon the flawed assumption that Congress had preempted all state jurisdiction over local telecommunications competition as a necessary predicate to the gratuity. The Seventh Circuit did not—and could not—make an express finding that the Act made such a broad preemption, because such a preemption does not appear anywhere in the Act, and implied preemption is forbidden by § 601(c)(1) of the 1996 Act.[5] The Seventh Circuit instead followed the lead of the Tenth Circuit in *MCI Telecomm's Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 938-939 (10th Cir. 2000) (*PSCU*), that Congress "essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity." That holding, in turn, rests on the bare assertion that, "[a]though it did not do so, Congress could have preempted all regulation of local phone service" (emphasis added). *Id.* at 938.

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[5] Not codified, but found as a note to 47 U.S.C. § 152.

A. The determination that Congress may in the exercise of Article I Commerce Clause powers in § 252 provide for a state's constructive waiver of its sovereign immunity is inconsistent with the limitation of constructive waiver in *College Savings*.

The holding of constructive waiver by the Seventh Circuit, described above, contravenes the Supreme Court's holdings in *College Savings* that a state's waiver of its sovereign immunity must be "unequivocally expressed" because "a congressional power to exact constructive waivers of sovereign immunity though the exercise of Article I powers would also, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*." *College Savings*, 527 U.S. at 675, 683. Moreover, the Court stated, "[T]here is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *Id.* at 680.

The basis of the Seventh Circuit's decision that Congress could have preempted all state regulation of local phone telecommunications leads precisely into the morass of equivocation that *College Savings* seeks to abolish by affirming the need for an "unequivocal declaration." The Seventh Circuit's holding does what *College Savings* prohibits, i.e., converts "mere presence in a field" to "actual consent." The court of appeals' holding fails to describe how Wisconsin as a state "accepted" the invitation and "allowed" its state commission to "exercise the power." *MCI* at 344 n.10. Given that the Act has no provision whatsoever for a state to expressly waive its Eleventh Amendment immunity, this assertion's reliance purely upon a "presence" in the field shows how far the lower court's holding has strayed from this Court's insistence upon an "unequivocal declaration."

The Supreme Court has recognized utility regulation as "one of the most important of the functions traditionally associated with the police power of the states." *New Orleans Pub. Serv. Inc. v. New Orleans*, 491 U.S. 350, 365 (1989). The

Seventh Circuit's holding creates the anomalous result that a state's commercial activities have more protection against inadvertent waiver than a states' exercise of sovereign police powers. Such a result was specifically rejected by the Supreme Court. *See College Savings*, at 686 n.4.

College Savings confines Congressional use of Article I powers to exact constructive waivers to bilateral state-federal transactions that are fundamentally consensual and where Congress has made the consequences of attached conditions sufficiently "unambiguous" in the relevant federal law. In *Petty*, two states wanted approval for an interstate bridge contract. Congress obliged but, in the enabling statute, required a waiver of sovereign immunity in tort suits. In *Dole*, South Dakota wanted federal highways money. Congress obliged, but required that persons under age 21 be barred by the state from purchasing or possessing alcoholic beverages as a condition of receipt of the money, if the state wished to avoid the withholding of up to 5% of allocable federal highway funds. Here, the issue is distinctly different: whether a state's existing, un-preempted police power presence in local telecommunications competition could lead to the waiver of Eleventh Amendment immunity in a subsequent judicial review action arising from an exercise of state powers in conformity with the Act. *College Savings* should have led the Seventh Circuit to find constructive waiver cannot be applied, as two other circuits have determined.

B. Circuit Courts have split as to whether *College Savings* treats the exercise of state regulatory police powers as an "otherwise permissible activity" not subject to constructive waiver under enactments pursuant to the Commerce Clause.

The Sixth Circuit has rejected the reasoning of the Seventh and Tenth Circuits for constructive waiver under the Act, thereby causing a "circuit split." *MCI*, 69 U.S.L.W. 1077, 1078 (U.S. Aug. 8, 2000). The Sixth Circuit stated that

it is "precisely because the wavier doctrine no longer provides a reliable basis for seeking relief against state commissions that we disagreed" with the Seventh Circuit's decision in *MCI* "and premised our conclusion that the plaintiff could proceed with its suit against the [Michigan Public Service Commission] solely on *Ex parte Young*, rather than waiver grounds." *GTE North, Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000).

The Second Circuit, by strong implication, concurs in such a rejection of constructive waiver in reviewing a different Commerce Clause enactment, the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601-9675 (1999). The Second Circuit rejected a plaintiff's claim that Connecticut constructively waived its sovereign immunity to suit in federal court under CERCLA "by engaging in an activity regulated by Congress, namely the operation of a prison from which toxic chemicals were released[,] . . . [b]ecause the law is now clear that a state cannot 'constructively waive[]' its sovereign immunity in the manner alleged . . . ." *Burnette v. Carothers*, 192 F.3d 52, 60 (2nd Cir. 1999), citing *College Savings*, 527 U.S. at 679-80. Arguably, the Fifth Circuit concurs. *See Chavez v. Arte Publico Press*, 204 F.3d 601, 604 n. 5 (5th Cir. 2000) (stating the implied waiver theory "is no longer available to support an Article I abrogation of Eleventh Amendment immunity").

Thus, courts of appeals may be found on each side of the question at hand. The relationship of a Commerce Clause enactment to a state's constitutional prerogative under the Eleventh Amendment is deserving of Supreme Court review.

II. EVEN ASSUMING THERE CAN BE VOLUNTARY CONSTRUCTIVE WAIVER, THE LEVEL OF COERCION OF STATE ACTION IN § 252 ACCEPTED BY THE SEVENTH CIRCUIT NONETHELESS EXCEEDS THE BOUNDARIES OF "ENCOURAGEMENT" IN SUPREME COURT TENTH AMENDMENT DECISIONS.

The Seventh Circuit's decision violates Wisconsin's Tenth Amendment protection by "coercing," not merely "encouraging," the PSCW into administering the Act. If voluntary constructive waiver is a valid doctrine, it is nonetheless not applicable under the Act in the present cases because § 252, as implemented by the FCC and construed by the Seventh Circuit, coerces state commissions to "opt in" to § 252 procedures. Because of the broad factual situations it covers—enforcement, SGATs, and arbitrations—the Seventh Circuit's decision ratifies the commandeering of state commissions to serve federal objectives in the Act. Section 252(e)(4) and (6) is effectively—and impermissibly—construed to require the state to "govern according to Congress' instructions." *New York*, 505 U.S. at 166. *See also Printz v. United States*, 521 U.S. 898, 924 (1997).

The instant case is unlike *Reno v. Condon*, 528 U.S. 141 (2000), in which this Court rejected a Tenth Amendment argument. There, the Court ruled that Congress could regulate the privacy of state motor vehicle department registrations under the Commerce Clause, even though the primary burdens of compliance fell upon the states. In the instant case, there is no state-sponsored commercial activity, only the state's exercise of its long-standing sovereign police powers to regulate telecommunications. *See New Orleans Pub. Serv., Inc. v. New Orleans*, 491 U.S. at 365.

The Seventh Circuit has substantially eroded the Supreme Court's articulation of the boundaries for proper federal encouragement of, or incentives for, state

cooperation in a federal regulatory scheme. *See New York*, 505 U.S. at 167-68. *New York* cites *FERC v. Mississippi*, 456 U.S. 742 (1982), as an example of acceptable cooperative federalism based on encouragement as distinguished from cooperation induced through conditions attached to disbursements of federal funds. In *FERC*, the Supreme Court, dealing with the Public Utility Regulatory Policies Act of 1978 ("PURPA"), Pub. L. 95-617, 92 Stat. 3117 (1978), sustained provisions of PURPA as applied to state commissions, noting in one provision that PURPA allowed for a case-by-case dispute resolution which fit within the state commission's traditional adjudicatory powers, and, in another provision, that Congress required only the consideration of federal standards. The Court said that the procedures for those substantive matters could be mandated, once an "option" was chosen by a state commission. *FERC*, 456 U.S. at 760, 764, 770-71. Most importantly, the "encouragements" in PURPA did not interfere with state agency adjudications of disputes and left intact state court review over state agencies, as provided by the state legislatures.

The Seventh Circuit's broad holding of states' voluntary acceptance of use of § 252 procedures generally—gathering, in one broad stroke, enforcement, SGAT and arbitration decisions—implicitly rejects the fundamental coercion of state choice evident in § 252(e)(4) and (6).

The coercion in § 252 is highlighted if one reviews several concerns facing a state commission when considering an SGAT or approving or rejecting an interconnection agreement. First, the FCC has said explicitly in its rules that it will not enforce state law standards if it preempts a state's jurisdictional responsibility under § 252(e)(5). 47 C.F.R. §§ 51.801 and 51.807(b) (1998). Thus, a state commission is at risk of allowing state law interests to go unaddressed unless the state acts

concurrently to apply federal and state law, as Congress allowed under §§ 251(d)(3) and 252(e)(3).[6]

If a state reviews an SGAT, that review must be completed within 60 days or the SGAT is deemed effective. Section 252(f)(3)(B). A second proceeding to preserve immunity would be unavailing because the SGAT would be deemed approved and immediately available for use in a § 271 proceeding before the FCC by a Bell Operating Company, such as Ameritech, thereby removing a state commission's ability to enforce state law requirements. If a state commission does not act to approve or reject a negotiated agreement within 90 days, or an arbitrated agreement within 30 days, the agreement is deemed approved. Section 252(e)(4). Given the foregoing statutory time constraints, a state commission has little chance of conducting a second, state law-only proceeding within the deadlines. So if the state commission does not consider state law requirements in a single proceeding with federal law requirements, the parties could conceivably file an SGAT or agree upon standards of interconnection below those acceptable to the state commission under state law.

In the case of an agreement, if in order to avoid waiver of its immunity yet enforce state law requirements a state commission attempts to conduct a subsequent review after an agreement is approved by inaction or after a federal arbitration is completed, it could face other difficulties. The contracting parties would likely argue that the agreement is protected by the Supremacy Clause as a contract created

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[6] Wisconsin's regulatory interest in telecommunications can be traced back to at least the provisions of 1911 Wis. Laws 546 and *Wisconsin Tel. Co. v. Railroad Comm'n*, 162 Wis. 383, 156 N.W. 614 (1916) (ordering physical connection between telephone systems in the public interest). Wisconsin's telecommunications reform law, 1993 Wis. Act 496, treats competition as a key means of delivering telecommunications services. *See* WIS. STAT. §§ 196.03(6)(a) (1997-98).

under federal law or as one having created vested rights protected by the Contract Clause. The fact that this unresolved legal question exists in and of itself coerces a state commission to opt into § 252 procedures. Even assuming second state law proceedings are feasible, they frustrate a key objective of the Act. Follow-up state proceedings would increase the very regulatory burden that Congress sought to reduce. *See* Act, preamble ("To promote competition and reduce regulation . . . .").

Finally, the Seventh Circuit's holding unnecessarily construes § 252(e)(4) to include enforcement of interconnection agreements in derogation of the reservation of state powers provided in the Tenth Amendment. Section 252 says nothing about enforcement jurisdiction, and § 601(c)(1) of the Act provides that the Act shall not be construed to "modify, impair or supersede" state law "unless expressly so provided." In addition, § 252(e)(4) does not expressly preempt state court review of an SGAT, just interconnection agreements. Yet, as to both situations, the Seventh Circuit's holding supersedes state law by implication. This is not merely an error in statutory construction as described more fully in III below, but an error rising to the level of a constitutional impairment of a state commission's rightful exercise of state law. This Honorable Court has held that a court should avoid interpreting a statute in a manner that would render it unconstitutional when another reasonable interpretation is available. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979), and *Edmond v. United States*, 520 U.S. 651, 658 (1997).

The options described above do not give a state a "genuine choice," but a "Hobson's choice." *See AT&T Commun's of the S. Cent. States, Inc. v. BellSouth Telecomm's Inc.*, 43 F. Supp. 2d 593, 602 (M.D. La. 1999) ("The option of either consenting to federal regulation and waiving immunity or losing the previously held power to regulate a local exchange carrier is not a choice that this court sees as

voluntary."). The coercion of state choice as to participation effectively commandeers the state commission on behalf of federal objectives. The coerced choice, ratified by the Seventh Circuit decision, manifests itself structurally by stripping off state court review of state commission action in favor of federal court review. This cross-jurisdictional jump is beyond anything accepted as "encouragement" under *New York* or *FERC*, and it intrudes directly into a state's execution of its police powers, unlike the situation in *Condon*. The Seventh Circuit's ruling sanctions a major, heretofore unseen, intrusion on state processes. This Court should grant review to assure the viability of the Tenth Amendment's constitutional function to protect the "States as States." *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 554 (1985) (holding that the constitutional limitation on the Commerce Clause "to protect the 'States as States' is one of process rather than one of result").

III. THE INSTANT CASE PRESENTS IMPORTANT QUESTIONS REGARDING THE COMITY OF STATE AND FEDERAL JURISDICTIONS UNDER THE ACT THAT THE SUPREME COURT SHOULD DECIDE.

The holding of the Seventh Circuit that federal courts have jurisdiction because of a gratuity is fundamentally flawed in its tacit assumption that Congress preempted all state jurisdiction over interconnection in order to make federal law via a "delegated" gift the only source of continued lawful state regulation. The preemption premise cannot be viably extended to exclude state judicial review because it contradicts the language of the Act and decisions of the Supreme Court and the FCC.

A. The implicit preemption rationale in the Seventh Circuit's decision disregards the plain language of the

§ 252, thereby frustrating the Act's intent to preserve state cooperation.

The text of § 252 of the Act does not indicate any express intention to preempt all state jurisdiction, both administrative and judicial, with respect to local telecommunications competition. Significantly, § 252(e)(5) suggests the exact opposite—no total preemption—because it provides for the FCC to order preemption should a state fail to act on an SGAT or interconnection agreement. This provision by itself contravenes any notion that there is an antecedent Congressional preemption of all state jurisdiction in relation to § 252 provisions in order to permit the gratuity of federal jurisdiction. This Court has required more than an inference to justify preemption. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (requiring "clear and manifest" showing of congressional intent to supplant state police powers). *Cf. Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981) (sanctioning express preemption of all state regulation, but with states permitted to re-regulate if they submitted regulatory plans for approval by the federal government).

Congress knew how to preempt in the Act, either by using the exact term in several sections, §§ 252(e)(5), 253(d) and 276(c), or by assigning "exclusive jurisdiction" to the FCC, as in §§ 251(e)(1) and 255(f). Congress even enacted a rule in § 601(c)(1) against implied preemption, as is inherent in the gift of jurisdiction rationale adopted by the Seventh Circuit. The lack of any mention of field preemption in the legislative history supports the proposition that there is no field preemption of state jurisdiction in the Act. *See* H. R. Conf. Rep. 104-458 at 124-126 (1996). While Congress was explicit in § 252(e)(4) in barring state court review of a state commission's actions in approving or rejecting an interconnection agreement, that provision is an element of the wrongful coercion of state action barred by the Tenth Amendment, as discussed in II above.

The foregoing express exclusion of state court review, however, also highlights the lack anywhere in § 252(e) of any express grant to federal district courts of subject matter jurisdiction over previously-approved interconnection agreements. In addition, § 252(e)(4) does not contain any bar to state court review of a commission decision on an SGAT, as it does with respect to interconnection agreements. These differences cannot support an interpretation that Congress intended that opting into § 252 procedures preempted all action under state law. If Congress uses certain language in one section and omits it in another section in the same act, "it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23, (1983) (citations omitted).

That a new federal scheme is in place can scarcely be denied. But the principal holding in *AT&T Corp.* does not place the regulatory scheme upon a field from which all state regulation has been banned. That case only held that the federal government has removed state regulation "[w]ith regard to the matters addressed by the 1996 Act . . . ." *AT&T Corp.*, 525 U.S. at 378 n.6. Footnote 6 should be seen as *dicta*. *See Wainwright v. Witt*, 469 U.S. 412, 422 (1985) (holding language in footnote is "not controlling."). The primary holding of *AT&T Corp.* is "not about whether the States will be allowed to do their own thing, but about whether it will be the FCC or the federal courts that draw the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. Unanswered is whether § 252 provides a constitutional method of federal court review of invited state action. Indeed, a reasonable view is that § 252, while setting forth some federal specifics of process and substance, sought to incorporate continuing state commission action in a field otherwise open to federal preemption. In essence, the analog here is the continued state regulation of the insurance industry which, like local telecommunications, may be deemed by Congress to affect interstate commerce

and therefore could be preempted if Congress acted to do so. *See Prudential Ins. Co. v. Benjamin*, 328 U.S. 408 (1946) (approving Congressional deferral to state regulation of insurance notwithstanding its interstate character) and 15A AM JUR. 2d *Commerce* § 21 (1976).

By implicitly asserting preemption—and the gift theory that follows—the Seventh Circuit's holding unnecessarily frustrates the state cooperation Congress clearly sought to obtain. Already labeled by the Court as hardly a "model of clarity," the Act needs Supreme Court review to establish the authoritative construction of § 252(e) that encourages, within constitutional limits, the state cooperation Congress intended.

B. The Seventh Circuit's decision conflicts with the FCC's interpretation of respective state and federal jurisdiction in contravention of *Chevron*.

The Seventh Circuit's decision ignored the FCC's treatment of "parallel jurisdiction" with states. As the administrative agency charged with implementation of the Act's interconnection provisions, the FCC did not articulate state jurisdiction under any gift concept. Nor did the agency find it necessary to preempt any state authority in order to place the "responsibilities" of § 252 in the hands of state commissions. According to the FCC, interconnection activities are not exclusive to the federal jurisdiction. The FCC determined that the only reasonable way to reconcile §§ 251 and 252 was that Congress created "parallel jurisdictions" for the FCC and the states where "sections 251 and 252 address both interstate and intrastate aspects of interconnection services and access to unbundled elements," and "the states' authority pursuant to section 252 also extends to both interstate and intrastate matters." First Report & Order, *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 15544-45 (1996), *modified on recons.*, 11 F.C.C.R. 13,042 (1996), *vacated in part, Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th

Cir. 1997), *aff'd in part, rev'd in part on other grounds sub nom., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

Under the principles enunciated by this Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Seventh Circuit should have deferred to the FCC's reasonable interpretation of state-federal jurisdiction in the administration of § 252. Under appropriate deference to the FCC's analysis of jurisdiction, the Seventh Circuit could not have arrived at its theory of implicit preemption with a gift back of jurisdiction.

IV. THE SEVENTH CIRCUIT'S APPLICATION OF *EX PARTE YOUNG* CONFLICTS WITH SUPREME COURT PRECEDENT IN *SEMINOLE TRIBE* AND EXPANDS *EX PARTE YOUNG* INAPPROPRIATELY TO APPLY TO OFFICIALS WHOSE ADMINISTRATIVE ACTIONS ARE ALREADY SUBJECT TO JUDICIAL REVIEW.

The Seventh Circuit's statement that *Ex parte Young* constitutes an "independent" basis for its decision implicitly states that, even if the court is incorrect as to constructive waiver, *Ex parte Young* will save the day by permitting direct injunction of state commissioners in each of the three cases appealed. The Seventh Circuit's decision violates two traditional limits of *Ex parte Young*, namely, that relief cannot be against the state when it is the true party in interest, see *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 101 (1984), and relief must be prospective in nature to address an ongoing violation, see *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977).

Critical for certiorari purposes, however, is the Seventh Circuit's extension of *Ex parte Young* beyond this Court's rulings. The Seventh Circuit decided that (1) the Act does not provide a limited remedial scheme falling within the *Seminole Tribe* bar to application of *Ex parte Young*; and implies by its decision that (2) state officials may be enjoined

under *Ex parte Young* in federal court even though the purportedly erroneous decisions of the state commission at issue could be subjected to concurrent state court review for compliance with both federal and state law. The former is a mis-application of *Seminole Tribe's* holding, and the latter improperly expands *Ex parte Young* to the detriment of state comity.

A. *Ex parte Young* may not be used under the Act to sue a state when Congress has otherwise prescribed a limited federal scheme of judicial review.

The district court held that *Seminole Tribe*, 517 U.S. at 75-76, applied because a limited scheme for judicial review was all that Congress found necessary in the way of remedies for non-compliance with the Act. The Seventh Circuit reversed, deciding, in essence, that the level of detail was the point of *Seminole Tribe*. According to the Seventh Circuit, because § 252(e)(6) was silent as to any limits on the exercise of a district court's remedial powers, Congress intended a broad scheme of review.

That analysis is faulty for having treated the *Seminole Tribe* analysis as turning exclusively on what judicial review powers were or were not granted the district court. The point of the *Seminole Tribe* discussion is that Congress had specified statutory procedures in lieu of resort to full judicial powers for reconciling state sovereignty power and the admission of Indian gaming within a state's boundaries. Section 252 is comparable as a procedural framework specifying how incumbent telecommunications utility monopoly power, created under state auspices, is to be reconciled to allow competitive markets. In both IGRA and the Act, Congress placed substantial primary—but not exclusive—reliance upon negotiations. Under IGRA, a court could order more negotiations between a state and a tribe. Under § 252(e)(6), judicial review was specifically limited to merely declaring whether an interconnection contract or SGAT complied with the Act. No more was authorized

because that is all Congress wanted in the way of judicial participation in a scheme seeking to maximize private party agreement.

The Seventh Circuit's decision contravenes *Seminole Tribe* to install judicial equity powers as a new "regulatory scheme" overlaying the Act, even though the principal objective of § 252 is to maximize private contracting and reduce regulation. This Honorable Court should not permit *Ex parte Young* to be applied, when the purpose of the Act is to maximize private party agreement with a minimum of regulatory oversight from both administrative agencies and the courts, whether state or federal.

B. *Ex parte Young* has not been extended by the Supreme Court to apply to enjoin erroneous actions of state officials acting in their official capacities where the opportunity for judicial review of such action is already available.

The Supreme Court has not conclusively ruled that state officials acting in a quasi-judicial capacity, applying state and federal law and subject to state court judicial review for the correction of errors of applicable law,[7] may be subject to *Ex parte Young* injunction. Indeed, the Supreme Court is of the exact opposite mind, having rejected "the argument that official action is invalid if based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 695 (1949). *See Pennhurst State School and Hospital*, 465 U.S. at 113 & n.22 (1984) (stating that an "error of law by state officers acting in their official capacities will not suffice to override the sovereign

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[7] Wis. Stat. §§ 196.41, 227.52, 227.53(1)(intro.), and 227.57(1), (3) (8) and (10) (1997-98) provide for review of PSCW "action or inaction" by Wisconsin state circuit courts. App. to Pet. 114-116.

immunity of the State where the relief is effectively against it").

The Seventh Circuit, however, implicitly asserts a contrary position when it treats *Ex parte Young* as an "independent" basis to secure federal law compliance. A reversal of the Seventh Circuit's waiver holding would leave only the *Ex parte Young* rationale applicable, even though state court review remains available to compel correction of an erroneous state commission action. Wisconsin's state administrative procedure act waives the state's immunity to suit. *Jackson County Iron Co. v. Musolf*, 134 Wis. 2d 95, 101-103, 396 N.W.2d 323, 325-26 (1986). The extension of *Ex parte Young* in the Seventh Circuit's ruling should be determined by the Supreme Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX A

UNITES STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 98-2127

MCI TELECOMMUNICATIONS CORPORATION and MCI METROACCESS TRANSMISSION SERVICES, INCORPORATED,

Plaintiffs-Appellees,

UNITED STATES OF AMERICA and FEDERAL COMMUNICATIONS COMMISSION.

Intervenors -Appellees,

v.

ILLINOIS BELL TELEPHONE COMPANY, doing business as Ameritech Illinois, Incorporated,

Defendant-Appellee,

ILLINOIS COMMERCE COMMISSION, TERRY HARVILL, RUTH K. KRETSCHMER, in their official capacities as Commissioners of the Illinois Commerce Commission and not as individuals, et al.,

Defendants-Appellants.

No. 99-2805

WISCONSIN BELL, INCORPORATED, doing business as Ameritech Wisconsin,

Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, in her official capacity as a member of the Commission, DANIEL J. EASTMAN, in his official capacity a member of the Commission, et al.,
Defendants-Appellees.

No. 99-2806

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,
Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, and JOSEPH P. METTNER, Commissioners of the Public Service Commission of Wisconsin,
Defendants-Appellees.

No. 99-2811

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,
Plaintiff-Appellant,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, et al.,
Defendants-Appellees.

No. 99-2873

MCI METRO ACCESS TRANSMISSION SERVICES, INCORPORATED, and MCI TELECOMMUNICATIONS CORPORATION,

Plaintiffs-Appellants,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, in their official capacities as members of the Commission, et al.,

Defendants-Appellees.

No. 99-2992

WISCONSIN BELL, INCORPORATED, doing business as AMERITECH WISCONSIN,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO, DANIEL J. EASTMAN, et al.,

Defendants-Appellees,

UNITED STATES OF AMERICA,

Intervenor-Appellant.

Appeals from the United States District Court
for the Western District of Wisconsin.
Nos. 97 C 566; 98 C 11; 98 C 153;
98 C 366—**Barbara B Crabb**, *Judge*

December 2, 1999, Argued
July 24, 2000, Decided

Before RIPPLE, KANNE and DIANE P. WOOD, *Circuit Judges.*

RIPPLE, *Circuit Judge.*

These consolidated appeals challenge determinations made by state regulatory commissions exercising their authority under the Telecommunications Act of 1996 ("the 1996 Telecommunications Act" or "the Act"), Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified in scattered sections of Title 47 of the United States Code). We must decide whether private carriers may sue state commissions and their commissioners in federal court for alleged violations of §§ 251 and 252 of the Act. These sections set forth the process by which Congress sought to bring competition to local telephone exchange markets through interconnection agreements between incumbent and new carriers. *See* 47 U.S.C. §§ 251 & 252 (Supp. II 1996).

One of the consolidated cases, 98-2127, is before us on rehearing. In this case, Illinois Bell, Inc. (doing business as Ameritech Illinois) ("Ameritech Illinois") and MCI Telecommunications and MCI Metro Access Transmission Services, Inc. (collectively "MCI") claim that the Illinois Commerce Commission ("the ICC") and various individual Commissioners ("the ICC Commissioners") violated the Act with respect to the ICC's arbitration and approval of the carriers' interconnection agreement. The ICC and the ICC Commissioners filed motions to dismiss on Eleventh Amendment immunity grounds. The district court denied those motions, *see MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 U.S. Dist. LEXIS 4470, No. 97 C 2225, 1998 WL

156678 (N.D. Ill. 1998), and the ICC and the ICC Commissioners have appealed.

We affirmed the district court's judgment in a previous opinion. *See MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, *amended by* 183 F.3d 558 (7th Cir. 1999). Thereafter, however, the Supreme Court issued a trio of opinions addressing the scope of Eleventh Amendment immunity. *See Alden v. Maine*, 527 U.S. 706, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999); *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 144 L. Ed. 2d 605, 119 S. Ct. 2219 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999). We therefore granted rehearing, restored 98-2127 to our calendar for oral argument, and requested that the parties file supplemental briefs addressing the impact of the Supreme Court's decisions on this case. See 183 F.3d at 567 (7th Cir. 1999).

The other cases, all from Wisconsin, are before us for the first time. Although aligned in various ways, the parties involved in the disputes include Wisconsin Bell, Inc. (doing business as Ameritech Wisconsin) ("Ameritech Wisconsin"), MCI[1], the Public Service Commission of Wisconsin ("the PSCW") and various members of that commission ("the PSCW Commissioners"). In each case, the PSCW or the PSCW Commissioners or both were named as defendants, and they filed motions to dismiss the lawsuits against them on Eleventh Amendment grounds. The district court granted the motions, *see Wisconsin Bell, Inc. v. Public Serv. Comm'n*, 57 F. Supp. 2d 710 (W.D. Wis. 1999), and the carriers now appeal the district court's judgment.

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[1] Again, both MCI Telecommunications Corp. and MCI Metro Access Transmission Services, Inc.

For the reasons that follow, we hold that the Eleventh Amendment does not bar these suits against the state commissions and their commissioners because, in the particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act. We also hold, as an independent basis for decision, that the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine.

I. BACKGROUND

A. The Statutory Scheme

Congress enacted the 1996 Telecommunications Act "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Pub. L. No. 104-104, 110 Stat. 56, 56 (1996). The Act "fundamentally restructures local telephone markets" by transforming the "long-standing regime of state-sanctioned monopolies" into a competitive market. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371, 142 L. Ed. 2d 834, 119 S. Ct. 721 (1999). Congress recognized that, even after the removal of regulatory restrictions on competition, significant economic barriers would remain to block entry into local telephone markets. Prospective market entrants would face the cost of duplicating an incumbent provider's local network infrastructure. To remove this economic barrier, the Act essentially requires incumbent local exchange carriers ("LECs") to share their networks with competitors. Section 251 of the Act requires incumbent LECs to allow new entrants to interconnect with existing local networks, to lease elements of existing local networks at reasonable rates, and to purchase the incumbents' services at

wholesale rates and resell those services to retail customers. *See* 47 U.S.C. § 251 (Supp. II 1996).

Section 252 sets out the process by which incumbent LECs and prospective carriers establish interconnection agreements. First, incumbent LECs and prospective carriers must negotiate in good faith to reach voluntary interconnection agreements. At any time during the negotiations, a party may ask the appropriate state commission to participate as a mediator in the negotiations. See id. § 252(a)(2). If negotiations prove unsuccessful, subsection 252(b) provides for compulsory arbitration of any open issues. During the period from the 135th to the 160th day after an incumbent LEC receives a request for negotiation, any party to the negotiation may petition the state commission to arbitrate any open issues. *See id.* § 252(b)(1). Sections 251 and 252 establish certain standards that the state commission must follow in resolving open issues by arbitration and in imposing conditions on the parties. The state commission is also bound by Federal Communications Commission ("FCC") regulations issued pursuant to § 251.

Subsection 252(e) requires any interconnection agreement reached by negotiation or arbitration to be submitted to the state commission for approval and specifies the grounds on which a state commission can reject an agreement. Specifically, state commissions may reject negotiated interconnection agreements only if the commission finds (1) that the agreement discriminates against a carrier that is not a party to the agreement or (2) that implementation of the agreement (or a part thereof) would be inconsistent with "the public interest, convenience, and necessity." *Id.* § 252(e)(2)(A). A state commission may reject an arbitrated interconnection agreement only if the agreement (or part thereof) (1) does not meet the requirements of § 251 and its implementing regulations or

(2) fails to meet the pricing standards set forth in subsection 252(d). *See id.* § 252(e)(2)(B).

Subsection 252(e)(5) further provides that, if a state commission fails to carry out any of its responsibilities under § 252, then the FCC must assume responsibility for the proceeding and act for the state commission in carrying out its functions. An implementing regulation to § 252 provides that a state commission "fails to act" for purposes of subsection 252(e)(5)--thus prompting the FCC to step in and assume the state commission's responsibilities--if it fails to respond within a reasonable time to a request for mediation or a request for arbitration, or if it fails to complete an arbitration within the established time limits. *See* 47 C.F.R. § 51.801(b). A state commission will not be deemed to have failed to act, however, if it merely fails to approve or reject an agreement within the established time limits. *See id.* § 51.801(c). In such a case, the agreement will be deemed approved. *See* 47 U.S.C. § 252(e)(4) (Supp. II 1996).

Therefore, subsections 252(e)(1), (e)(4), and (e)(5), taken together and read in conjunction with the FCC regulations, create a scheme that provides regulatory oversight of interconnection agreements, either by a state commission or by the FCC in the state commission's place. Only one scenario, not present in our cases, appears to be a variation to this scheme: when the parties reach a voluntarily negotiated agreement without any request for mediation or arbitration and the state commission fails to act to approve or reject the agreement. When these two circumstances occur, the resulting agreement will be deemed approved by the state commission, *see id.* § 252(e)(4); the FCC will not step in to assume the approval function.

The Act provides that federal district courts have exclusive jurisdiction to review FCC or state commission

actions relating to interconnection agreements. In subsection 252(e)(4), Congress expressly eliminated state court jurisdiction to review actions of state commissions in approving or rejecting agreements under § 252. Moreover, subsection 252(e)(6), titled "Review of State commission actions," provides that, whenever a state commission fails to act, the exclusive remedies for that failure to act will be proceedings by the FCC and any judicial review of the FCC's actions. Subsection 252(e)(6) also provides that, "in any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]."

On a separate but related note, Congress also has opened up long distance service competition. The Act allows Bell operating companies[2] ("BOCs"), such as Ameritech Illinois or Ameritech Wisconsin in our cases, to provide long distance service to their customers--a service generally off limits to BOCs under the pre-1996 Telecommunications Act regime--once certain conditions have been met. Section 271 of the Act allows BOCs to provide "out-of-region" long distance service. *See id.* § 271(b)(2). For a BOC to provide "in-region" long distance service, however, the BOC must obtain FCC approval. *See id.* § 271(b)(1). To obtain FCC approval, the BOC must satisfy numerous requirements, one of which is to show that the BOC has opened up its local network to interconnection with new competitors. *See id.* § 271(c). A BOC may make this showing either by entering into interconnection agreements

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[2] A "Bell operating company" is one of the local "Baby Bells" split off from AT&T in the divestiture decree. *See* Peter W. Huber et al., *Federal Telecommunications Law* 1362 (2d ed. 1999); *see also* 47 U.S.C. § 153(4) (Supp. II 1996) (listing the individual Bell operating companies).

with "one or more unaffiliated competing providers of telephone exchange service," *id.* § 271(c)(1)(A), or, if no new entrants have requested interconnection with the BOC, by showing that the appropriate state commission has approved "a statement of the terms and conditions that the [BOC] generally offers to provide such access and interconnection," *id.* § 271(c)(1)(B). These two "methods" of obtaining FCC approval are commonly known as "Track A" and "Track B." *See generally SBC Communications Inc. v. F.C.C.*, 138 F.3d 410, 413-21 (D.C. Cir. 1998) (discussing the tracks by which BOCs may obtain FCC approval under § 271 to provide in-region long distance services).

For a BOC seeking to obtain FCC approval using the Track B approach, subsection 271(c)(1)(B) requires the BOC to file with the appropriate state commission a statement of generally available terms and conditions (a "SGAT") and to obtain approval of the SGAT as provided by subsection 252(f). The SGAT sets forth the terms and conditions the company intends to offer new entrants seeking interconnection and access to the BOC's network. Once a BOC has filed a SGAT with a state commission, that commission has 60 days within which to complete a review of it, *see* 47 U.S.C. § 252(f)(3)(A) (Supp. II 1996), or to permit the statement to take effect, *see id.* § 252(f)(3)(B). According to subsection 252(f)(2), a state commission may not approve an SGAT unless the SGAT complies with subsection 252(d) and § 251 and the FCC regulations thereunder. The Act also allows state commissions to establish and enforce state law requirements in their review of an SGAT, but the commissions may do so only if those standards do not conflict with the Act. *See id.* § 252(f)(2). Even after an SGAT has been allowed to take effect under subsection 252(f)(3)(B), however, the state commission may continue to review such an SGAT and may approve or disapprove it under subsection 252(f)(2) at any time. *See id.* § 252(f)(4). As with the interconnection process, if a state commission fails to act and the FCC has been made aware of that failure to act, the

FCC must assume responsibility for the SGAT and act in place of the state commission within 90 days. *See id.* § 252(e)(5). Similarly, the judicial review provision in subsection 252(e)(6) also applies to state commission determinations regarding SGATs.

B. The Illinois Litigation

1. The Lawsuit

Appeal 98-2127 began as a lawsuit over an interconnection agreement between Ameritech Illinois and MCI. After negotiations failed to produce an interconnection agreement between the two companies, MCI petitioned the ICC, in accordance with subsection 252(b)(1) of the Act to arbitrate the unresolved issues. The ICC held arbitration hearings and eventually approved a final interconnection agreement for the two companies. MCI then filed suit against Ameritech Illinois, the ICC, and various individual ICC Commissioners in their official capacities. MCI alleged that the ICC had violated certain sections of the Act when conducting the arbitration proceedings and approving the terms of the interconnection agreement. Ameritech Illinois filed a cross-claim against MCI, the ICC, and the ICC Commissioners in their official capacities, asserting that one aspect of the approved interconnection agreement was contrary to the Act. In their complaints, both MCI and Ameritech Illinois sought declaratory and other equitable relief.[3]

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[3] Ameritech Illinois also filed a separate action against the ICC Commissioners, challenging their approval of two negotiated interconnection agreements between Ameritech Illinois and other telecommunications carriers. An appeal in that case, 98-2256, originally was part of this appeal. The agreements at issue in 98-2256 were made through private negotiations without mediation or arbitration by the ICC. During the pendency of the appeal in 98-2256, however, Ameritech Illinois filed a motion

2. The Motions to Dismiss

The ICC and the ICC Commissioners moved to dismiss the claims against them on Eleventh Amendment sovereign immunity grounds. The ICC and the ICC Commissioners argued to the district court that the Act could not abrogate Illinois' immunity. They pointed out that Illinois had not explicitly authorized waiver of its immunity through any statute or constitutional provision. They further contended that their participation in the arbitration and review process under the Act did not constitute waiver of sovereign immunity because no provision of the Act required the state to submit to suit as a condition for exercising the authority granted it.

Ameritech Illinois and MCI replied that Congress had conditioned state commissions' participation in the arbitration and approval process on their submission to federal court jurisdiction. Thus, they argued, the ICC and the ICC Commissioners waived any Eleventh Amendment immunity when they elected to implement the federal regulatory scheme set forth in the Act with full knowledge that their determinations would be reviewable exclusively in federal court.

In reply, the ICC and the ICC Commissioners reemphasized that the Act contains no specific language expressly conditioning state commission participation in the

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requesting that we remand 98-2256 to the district court so that it may be dismissed voluntarily with prejudice. We have granted that motion and therefore need not address the applicability of the Eleventh Amendment to litigation involving such privately negotiated agreements. We also have remanded to the district court a different case, 98-2566, which was originally part of this consolidated appeal, so that it too may be dismissed voluntarily.

regulatory process on consent to suit in federal court. Rather, they contended, the Act provides only for federal court review of the agreements themselves.

3. Decision of the District Court

The district court denied the motions to dismiss. The district court determined that the ICC defendants constructively had waived their Eleventh Amendment immunity and, in the alternative, that there was no Eleventh Amendment barrier to the suits against the ICC Commissioners because of the *Ex parte Young* doctrine. The district court's decision in this case preceded the Supreme Court's decisions in *Alden*, *College Savings* and *Florida Prepaid*, and, therefore, the district court could not have accounted for any impact those decisions might have on the Eleventh Amendment analysis.

(a)

The district court first determined that *Seminole Tribe v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), had not invalidated the doctrine of implied waiver. In the court's view, although *Seminole Tribe* restricted Congress' ability to abrogate directly the states' sovereign immunity, the Supreme Court's decision left untouched the "unremarkable and completely unrelated" doctrine of waiver. *MCI Telecomms. Corp. v. Illinois Bell Tel. Co.*, 1998 U.S. Dist. LEXIS 4470, *19, No. 97 C 2225, 1998 WL 156678, at *6 (N.D. Ill. 1998) (quoting *Seminole Tribe*, 517 U.S. at 63) (internal quotation marks omitted). The district court then concluded that the ICC had participated voluntarily in the regulatory scheme established by the 1996 Telecommunications Act because the Act provided states with the option to arbitrate and to approve the interconnection agreements themselves or, instead, to let the FCC perform that function. Additionally, the district court noted, Congress had made it expressly clear in subsection

252(e)(6) that, if a state opted to participate in the regulatory scheme, its actions would be reviewable in federal court. Thus, the court concluded, the ICC had waived immunity from suit in federal court by participating voluntarily in the arbitration and approval process.

(b)

In the alternative, the district court also held that the doctrine of *Ex parte Young* provided a basis for the ICC Commissioners' lack of Eleventh Amendment immunity from this suit. The district court first noted that, contrary to the ICC Commissioners' arguments, the relief sought by Ameritech Illinois and MCI was prospective in nature. The companies sought no money damages but only declaratory and injunctive relief to redress ongoing violations of federal law.

The district court also rejected the ICC Commissioners' argument that an *Ex parte Young* action is available only when plaintiffs allege a constitutional (as opposed to statutory) violation. Relying on our decision in *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), the court held that an *Ex parte Young* action can be brought to vindicate violations of a federal statute.

The district court then concluded that the limitations placed on the *Ex parte Young* doctrine by *Seminole Tribe* and *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997), did not affect the application of the *Ex parte Young* doctrine to this case. *Seminole Tribe* limited, the district court acknowledged, the reach of *Ex parte Young* in cases in which Congress has created a detailed and comprehensive remedial scheme. But, the district court held, the provisions of the 1996 Telecommunications Act at issue in this case did not create any such detailed scheme that would limit the type of remedies available to a district court. The district court further held that the narrow exception to

Ex parte Young created in *Coeur d'Alene* also did not apply to this case. The district court explained that "the issues of sovereign immunity presented by review of state actions taken pursuant to the Telecommunication Act are not nearly as compelling as those presented by the state of Idaho in the dispute over lands that it has historically considered a part of its territory." 1998 U.S. Dist. LEXIS 4470, *40, 1998 WL 156678, at *12.

Finally, the district court rejected the ICC Commissioners' argument that Congress did not intend to make states parties to the federal suits reviewing interconnection agreements, but instead meant only to provide review of the agreements themselves. In rejecting this argument, the district court pointed out that the subsection providing for federal court review was titled "Review of State Commissions *Actions.*" 1998 U.S. Dist. LEXIS 4470, *43.

C. The Wisconsin Litigation

1. The Lawsuits

(a)

Appeals 99-2805, 99-2873 and 99-2992 are the result of a dispute over an interconnection agreement entered into by Ameritech Wisconsin and MCI and approved by the PSCW. Ameritech Wisconsin and MCI had entered into interconnection negotiations as provided under subsection 252(a) of the Act, but because the parties failed to reach an agreement on some issues, MCI petitioned the PSCW under subsection 252(b)(1) to arbitrate the remaining issues. The PSCW held arbitration hearings and ultimately approved a final interconnection agreement between Ameritech Wisconsin and MCI.

The final agreement satisfied neither party. Thus, Ameritech Wisconsin filed suit against MCI, the PSCW, and the PSCW Commissioners in their official capacities to challenge portions of the final agreement approved by the PSCW. In its complaint, Ameritech Wisconsin alleged that certain provisions of the final agreement were contrary to the 1996 Telecommunications Act. The complaint sought declaratory and injunctive relief to enjoin the enforcement of the challenged provisions. Thereafter, MCI filed its own suit against Ameritech Wisconsin, the PSCW, and the PSCW Commissioners in their official capacities to challenge other portions of the same agreement. Like Ameritech Wisconsin, MCI alleged in its complaint that various provisions of the final agreement violated the 1996 Telecommunications Act. MCI also sought declaratory and injunctive relief. The district court consolidated the two cases, and the United States later intervened. After the district court issued its decision in this case, each party filed its own notice of appeal.

(b)

Appeal 99-2806 involves the PSCW's interpretation and enforcement of previously approved interconnection agreements between Ameritech Wisconsin and TCG of Milwaukee, Inc. ("TCG") and between Ameritech Wisconsin and Time Warner Communications of Milwaukee L.P. ("Time Warner"). Ameritech Wisconsin and TCG entered into their agreement, which was approved by the PSCW, following negotiations and arbitration; Ameritech Wisconsin and Time Warner arrived at their final agreement, which the PSCW also approved, after negotiations only.

Ameritech Wisconsin's interconnection agreements with TCG and Time Warner require "reciprocal compensation" only for "local traffic" calls (calls "beginning" and "terminating" within the "local calling area"). After the

PSCW had approved these agreements, a dispute arose over whether Ameritech Wisconsin was required, under its respective interconnection agreements with TCG and Time Warner, to pay reciprocal compensation for calls placed by Ameritech Wisconsin customers to the Internet via Internet service providers who were, in turn, customers of TCG or Time Warner. Because Ameritech Wisconsin believed that the disputed Internet calls did not "terminate" within the local calling area, it deemed these calls not to be "local traffic" and therefore refused to pay reciprocal compensation for them.

TCG and Time Warner, however, understood their respective interconnection agreements to entitle them to reciprocal compensation for the disputed Internet calls. Thus, they filed separate complaints with the PSCW. The companies alleged that Ameritech Wisconsin was not complying with the reciprocal compensation provisions of their respective interconnection agreements, and they asked the PSCW to enforce those provisions. The PSCW adopted the interpretation proffered by TCG and Time Warner and later entered separate enforcement orders against Ameritech Wisconsin ordering it to pay the requested reciprocal compensation. Ameritech Wisconsin then filed suit in the district court and named as defendants TCG, Time Warner, the PSCW, and the PSCW Commissioners in their official capacities. In its complaint, Ameritech Wisconsin alleged that the PSCW's enforcement orders were contrary to the 1996 Telecommunications Act, FCC regulations, and Wisconsin law. The complaint sought declaratory and other equitable relief.

(c)

The final appeal, 99-2811, stems from the PSCW's rejection of an SGAT filed with the PSCW by Ameritech Wisconsin. In proceedings before the PSCW, a number of new entrants opposed portions of the SGAT filed by

Ameritech Wisconsin. The PSCW adopted the views of those that opposed Ameritech Wisconsin's SGAT, and the PSCW eventually rejected the SGAT. Ameritech Wisconsin filed suit in the district court against the PSCW and the PSCW Commissioners in their official capacities to obtain judicial review of that decision. Ameritech Wisconsin's complaint alleged violations of the 1996 Telecommunications Act, and, to the extent that the PSCW had purported to rely on state law to make its decision, the complaint further alleged that the Act preempted the state laws. Ameritech Wisconsin sought declaratory and other equitable relief.[4]

2. The Motions to Dismiss

Like their Illinois counterparts, the PSCW and the PSCW Commissioners filed motions to dismiss each of these cases. They argued that the Eleventh Amendment provided them with immunity from suit in federal court.

Ameritech Wisconsin and MCI argued that Wisconsin had waived its immunity by choosing to regulate interconnection agreements in accordance with the 1996 Telecommunications Act. By exercising the power granted by the Act, according to Ameritech Wisconsin and MCI, the PSCW and the PSCW Commissioners had consented implicitly to being sued in federal court under subsection 252(e)(6). Alternatively, Ameritech Wisconsin and MCI argued that the PSCW Commissioners could be sued under the Ex parte Young doctrine.

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[4] Three new entrants sought to intervene in Ameritech Wisconsin's suit over the SGAT, but the district court denied the motions because it concluded that the PSCW would adequately represent the prospective intervenors' interests. The district court's denial of the motions to intervene is not before us on appeal.

3. Decision of the District Court

The district court issued two decisions relevant to our discussion. In both opinions, the district court held that Eleventh Amendment immunity barred the suits against the PSCW and the PSCW Commissioners.

(a)

In its first opinion, reported at *Wisconsin Bell, Inc. v. Public Serv. Comm'n*, 27 F. Supp. 2d 1149 (W.D. Wis. 1998), the district court granted the motions to dismiss. According to the court, the PSCW had not waived its immunity by performing its role under § 252 of the 1996 Telecommunications Act. Furthermore, the district court concluded that the suits against the PSCW Commissioners could not proceed under the *Ex parte Young* doctrine.

The district court first analyzed whether the PSCW and the PSCW Commissioners could have waived their immunity by acting on the interconnection agreements and SGAT at issue in the cases before it. In the court's estimation, Congress had made its intention sufficiently clear in the 1996 Telecommunications Act that state commissions would be subject to suit in federal court to defend their rulings. Nevertheless, the district court concluded, the Act did not obtain a valid, voluntary waiver of immunity from states. The court reached this conclusion after evaluating the Supreme Court's decisions in *Parden v. Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), and *Employees of the Department of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973), both of which concerned the so-called "constructive waiver" doctrine.

According to the district court, under these cases the constructive waiver doctrine could not apply to the 1996

Telecommunications Act for several reasons. First, the court noted that, despite the many changes in telecommunications regulation wrought by the Act, the Act preserved the states' role as the primary regulators of local telephone service; the district court understood the Supreme Court's holding in *Employees* to preclude the application of the constructive waiver doctrine "when the federal government amends or enacts a law making a state subject to suit merely by continuing in existing activities to protect its citizens." 27 F. Supp. 2d at 1158 (citing *Employees*, 411 U.S. at 296 (Marshall, J., concurring)). The district court next observed that when state commissions are asked to review voluntarily negotiated interconnection agreements, state commissions must review that agreement "or accept the consequence that the agreement will go into effect without any form of government oversight." *Id.* Finally, the district court explained its view that "staying out of the interconnection process cannot be said to be a realistic option for a state commission" because the commission cannot be expected to abandon its mandate to protect the public interest. *Id.* For these reasons, the district court explained, any waiver obtained from Wisconsin under the Act could not have been voluntary.

The district court also determined that the *Ex parte Young* doctrine was inapplicable to these cases. The court reached this conclusion based on its reading of the Supreme Court's decision in *Seminole Tribe*. According to the district court, in order for it to determine whether application of the *Ex parte Young* doctrine was appropriate here, *Seminole Tribe* required the court to engage in a two-step inquiry. Thus, it analyzed (1) whether Congress created a remedy for the rights created in the 1996 Telecommunications Act and (2) whether the remedy created by Congress contemplated a suit against a state official. The district court never reached the second aspect of this inquiry because it concluded that, with the Act, Congress had created an adequate remedy to secure federal rights such that *Seminole Tribe* precluded the

application of the *Ex parte Young* doctrine in these cases. The district court explained that, although the remedy created in subsection 252(e)(6) was "much less 'detailed'" than the statutory remedy at issue in *Seminole Tribe*, the court believed that it would be improper simply to compare the two statutory schemes to see which one was more detailed. 27 F. Supp. 2d at 1161. Rather, the court stated, "a 'simple' remedy may be all that is necessary to secure federal rights." *Id.* The district court concluded that Congress made a choice in the Act to limit the available remedy under § 252 "to having a commission's ruling tested in federal court." *Id.* This "limited review" scheme, said the court, allowed federal courts "to cure errors in federal law without subjecting state commissioners to the full remedial powers of a federal district court." *Id.* Under *Seminole Tribe*, the court concluded, the *Ex parte Young* doctrine could not be used here "because the remedy Congress chose secures federal rights adequately." *Id.* That Congress had chosen, as it turns out, an unconstitutional remedy did not change the result here, the district court explained, because under *Seminole Tribe* it was "prevented from 'rewriting the statutory scheme in order to approximate what [it thought] Congress might have wanted.'" *Id.* (quoting *Seminole Tribe*, 517 U.S. at 76).

(b)

Although the district court had ruled that the suits against the PSCW and the PSCW Commissioners should be dismissed, the court stayed the enforcement of its ruling pending further briefing and argument by the parties on whether the PSCW and the PSCW Commissioners were necessary parties under Rule 19(b) of the Federal Rules of Civil Procedure. The district court also allowed the PSCW and the PSCW Commissioners to amend their answers to include a Tenth Amendment defense.

Before the district court issued an opinion addressing the remaining Rule 19(b) issues, however, we

issued our initial decision in 98-2127. *See MCI Telecomms. Corp. v. Illinois Commerce Comm'n*, 168 F.3d 315, *amended by* 183 F.3d 558 (7th Cir. 1999). The district court ordered further briefing and argument from the parties on the effect our opinion had on the cases before the district court. Then, the Supreme Court issued its rulings in *Alden*, *College Savings* and *Florida Prepaid*. After hearing argument from the parties, the district court issued a final opinion, reported at *Wisconsin Bell, Inc. v. Public Serv. Comm'n*, 57 F. Supp. 2d 710 (W.D. Wis. 1999), dismissing the suits.

In this second ruling, the district court explained that our initial decision in 98-2127 was no longer controlling in light of the Supreme Court's intervening decision in *College Savings*. According to the district court, it was obligated to follow the most recent Supreme Court precedent, and *College Savings*, the court believed, compelled the dismissal of the suits against the PSCW and the PSCW Commissioners. The district court recognized that *College Savings* preserved "some apparent constructive waivers," such as when Congress provides a gift to a state in return for the state's waiver of immunity, but it concluded that the Supreme Court's decision precluded the finding of such a waiver in the context of the 1996 Telecommunications Act. *Id.* at 715. Instead, the court explained, "there is no arguable basis to a claim that equates a gift with a state's participation in the act's cooperative federalism (supervising the regulation of local telephone carriers in the state)." *Id.* Within the context of the 1996 Telecommunications Act, the district court explained, a state's acceptance of the "gift" of being able to participate in the interconnection process could not be equated with the kind of "gifts" found acceptable by the Supreme Court in *College Savings*. "A state's continued regulation of local enterprise (local telephone carriers)," the district court reasoned, "is an 'otherwise permissible activity' that can yield no inference as to a state's motivation for doing it." *Id.*

The district court also reaffirmed its prior ruling on the applicability of the *Ex parte Young* doctrine. In addition to the points it had raised in its first decision, the court further noted two other problems with proceeding under the *Ex parte Young* doctrine in these cases. First, the court noted that "one must acknowledge the conceptual difference between a state official performing state functions in a way that violates federal law and a state official who is performing federally authorized functions but is alleged to have performed those functions improperly." *Id.* at 713. Second, the court noted "the oddity" of allowing an *Ex parte Young* suit to proceed against individual commissioners, some of whom may have dissented from the decision being challenged in court. *Id.* In the end, however, the district court explained that, even if these hurdles to applying the *Ex parte Young* doctrine could be overcome, *Seminole Tribe* precluded the application of the doctrine to these cases because the 1996 Telecommunications Act provided a limited remedy for violations of the Act.[5]

II. DISCUSSION

The Eleventh Amendment to the Constitution of the United States provides:

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[5] In its second decision, the district court also held that, in light of this circuit's decision in *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566 (7th Cir. 1999), the PSCW and the PSCW Commissioners were necessary parties to these suits. Because the PSCW and the PSCW Commissioners were necessary parties and because the district court had concluded that they were entitled to immunity, the district court held that the cases had to be dismissed in their entirety for failure to join necessary parties. We hold today, however, that the PSCW and the PSCW Commissioners may be sued in federal court; thus, we need not address the Rule 19(b) arguments raised by the parties.

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Supreme Court has long held that this Amendment bars federal jurisdiction over suits brought against a state, not only by citizens of another state or a foreign state, but also by its own citizens. *See, e.g., College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 627, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Edelman v. Jordan*, 415 U.S. 651, 662-63, 39 L. Ed. 2d 662, 94 S. Ct. 1347 (1974); *Hans v. Louisiana*, 134 U.S. 1, 13-15, 33 L. Ed. 842, 10 S. Ct. 504 (1890). The immunity conferred on a state by the Eleventh Amendment extends to state agencies as well. *See, e.g., Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144, 121 L. Ed. 2d 605, 113 S. Ct. 684 (1993). Subject to the exception carved out in *Ex parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), the Eleventh Amendment also bars federal jurisdiction over suits against state officials acting in their official capacities when the state is the real party in interest. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101-02, 79 L. Ed. 2d 67, 104 S. Ct. 900 (1984) (*"Pennhurst II"*).

The immunity afforded to states by the Eleventh Amendment, however, is not absolute. *See College Savings*, 527 U.S. at 670. Congress may exercise its power under the Fourteenth Amendment and thereby authorize private suits against unconsenting states. *See id.; Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 49 L. Ed. 2d 614, 96 S. Ct. 2666 (1976). A state also may waive its immunity from suit. *See College Savings*, 527 U.S. at 670; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 238, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985); *Marie O. v. Edgar*, 131 F.3d 610, 615 (7th Cir. 1997). Additionally, the *Ex parte*

Young doctrine allows private parties to sue individual state officials for prospective relief to enjoin ongoing violations of federal law. *See, e.g., Ex parte Young*, 209 U.S. at 159-60; *Dean Foods Co. v. Brancel*, 187 F.3d 609, 613 (7th Cir. 1999); *Marie O.*, 131 F.3d at 615.

We review de novo a district court's judgment on whether to dismiss a claim on Eleventh Amendment immunity grounds. *See Goshtasby v. Board of Trustees of the Univ. of Ill.*, 141 F.3d 761, 764 (7th Cir. 1998), *abrogated on other grounds by Kimel v. Florida Bd. of Regents*, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000).

A. Threshold Matters

As a threshold matter, the ICC and the ICC Commissioners, relying on subsection 252(e)(6), submit that we need not concern ourselves with the application of the Eleventh Amendment because the 1996 Telecommunications Act does not even provide for suits against states in federal court, but instead provides only for federal court review of the interconnection agreements themselves. We cannot accept this contention; the provisions of the Act, read as a whole, will not permit such a construction and, indeed, make clear that Congress' intent was to the contrary.

At the outset, we note that the subsection providing for judicial review is titled "Review of State commission actions," not "Review of interconnection agreements," thus signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions. Moreover, subsection 252(e)(4), when read in conjunction with subsection 252(e)(6), provides additional evidence that Congress contemplated suits against state defendants in federal court. Subsection 252(e)(4) provides that "no State court shall have jurisdiction to review the

action of a State commission in approving or rejecting an agreement under this section." 47 U.S.C. § 252(e)(4) (Supp. II 1996). This language indicates that Congress envisioned suits reviewing "actions" by state commissions, as opposed to suits reviewing only the agreements themselves, and that Congress intended that such suits be brought exclusively in federal court.

In a similar vein, the PSCW and the PSCW Commissioners contend that we lack subject matter jurisdiction in case 99-2806 because that case involves the enforcement of previously approved interconnection agreements. According to the PSCW and the PSCW Commissioners, subsection 252(e)(6) does not confer jurisdiction on federal courts to review enforcement or other post-approval determinations made by state commissions. Instead, they submit, the plain language of subsection 252(e)(6) limits federal jurisdiction to reviewing a state commission's approval or rejection of an interconnection agreement or SGAT.

We decline to read subsection 252(e)(6) so narrowly. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 208 F.3d 475, 479-81 (5th Cir. 2000). A state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission. *See id.* at 479-80; *Iowa Utils. Bd. v. F.C.C.*, 120 F.3d 753, 804 & n.24 (8th Cir. 1997) (stating that "the state commissions' plenary authority to accept or reject these [interconnection] agreements necessarily carries with it the authority to enforce the provisions of agreements that the state commissions have approved"), *aff'd in part and rev'd in part on other grounds sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 142 L. Ed.

2d 834, 119 S. Ct. 721 (1999).[6] In sum, we believe that subsection 252(e)(6) contemplates that state commissions will be parties to suits brought by those aggrieved by their determinations. This provision confers federal jurisdiction to review "state commission rulings on complaints pertaining to interconnection agreements and . . . such jurisdiction is not restricted to mere approval or rejection of such agreements." *Southwestern Bell*, 208 F.3d at 481; *see also Illinois Bell Tel. Co. v. Worldcom Techs.,Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999) (stating that federal courts have jurisdiction under subsection 252(e)(6) to review "actions" by state commissions that relate to interconnection agreements).

B. Abrogation

Unquestionably, Congress could not have abrogated state sovereign immunity with the 1996 Telecommunications Act. The Act is an exercise of Congress' Commerce Power under Article I of the Constitution, *see* 47 U.S.C. § 151 (Supp. II 1996), and as the Supreme Court has made inescapably clear, Congress may not abrogate Eleventh Amendment immunity through the exercise of its Article I powers. *See College Savings*, 527 U.S. at 672; *Florida Prepaid Postsecondary Educ. Expense Bd. v. College Savings Bank*, 527 U.S. 627, 636, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); *Seminole Tribe v. Florida*, 517 U.S. 44, 72, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996) ("Even when the Constitution vests in Congress complete lawmaking authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting States."). Thus, because the states' immunity cannot be abrogated by the 1996

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[6] *See also Puerto Rico Tel. Co. v. Telecommunications Regulatory Bd.*, 189 F.3d 1, 10 (1st Cir. 1999) (assuming, without deciding, that state commission interpretations and enforcements of agreements are subject to federal court review under subsection 252(e)(6)).

Telecommunications Act, we must look to whether Illinois and Wisconsin have waived their Eleventh Amendment immunity in the cases before us.

C. Waiver

1.

The decision to waive Eleventh Amendment immunity lies solely with the state, *see College Savings*, 527 U.S. at 675, and we "indulge every reasonable presumption against" a state's waiver of its immunity, *see id.* at 682 (quotation marks and citation omitted). Thus, the test "for determining whether a State has waived its immunity from federal-court jurisdiction is a stringent one." *Id.* at 675 (quoting *Atascadero*, 473 U.S. at 241 (internal quotation marks omitted)). We may find that a state has waived its immunity when "the State voluntarily invokes" federal jurisdiction or when "the State makes a 'clear declaration' that it intends to submit itself" to federal jurisdiction. *College Savings*, 527 U.S. at 675-76 (citations omitted). In either case, there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment." *Atascadero*, 473 U.S. at 238 n.1; *see also College Savings*, 527 U.S. at 680 ("The whole point of requiring a 'clear declaration' *by the State* of its waiver is to be certain that the State in fact consents to suit."); *Mueller v. Thompson*, 133 F.3d 1063, 1064 (7th Cir. 1998) ("No magic words are required, but implicit waivers won't do; the court must be highly confident that the state really did intend to allow itself to be sued in federal court." (citations omitted)).

2.

The Supreme Court's recent decisions in *Alden*, *College Savings* and *Florida Prepaid* have refined the

jurisprudence with respect to state sovereign immunity. The Court's decisions in *Alden* and *Florida Prepaid*, although impacting Eleventh Amendment jurisprudence in other important ways, do not bear directly on the questions of waiver that we confront in our cases. In contrast, the Court's decision in *College Savings* is especially pertinent to our analysis here because that decision squarely addressed Congress' power to obtain waivers of state immunity when Congress acts within its Article I powers. In *College Savings*, the Court held that states do not "constructively" waive their sovereign immunity by engaging in activities in interstate commerce that are regulated by Congress under its Article I power. *See College Savings*, 527 U.S. at 680. By so holding, the Court overruled *Parden v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), a case in which the Court had held that Alabama waived its sovereign immunity by operating a railroad that was regulated by Congress under its Commerce Power.

At issue in *College Savings* was whether the state of Florida had "constructively" waived its immunity by marketing a college savings plan in interstate commerce. By an amendment to the Lanham Act[7], Congress had subjected states to suit in federal court for false representations in commerce, and the plaintiff, College Savings Bank, argued that Florida had waived its immunity by engaging in the activity regulated by that federal statute. The Supreme Court disagreed. According to the Court, Florida could not waive its immunity merely by engaging in the regulated activity because "there is little reason to assume actual consent based upon the State's mere presence in a field subject to congressional regulation." *College Savings*, 527 U.S.

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7. *See* 15 U.S.C. §§ 1122, 1125(a) (as amended by the Trademark Remedy Clarification Act, Pub. L. No. 102-542, § 3(b)-(c), 106 Stat. 3567, 3567-68 (1992)).

at 680; *see also Burnette v. Carothers*, 192 F.3d 52, 60 (2d Cir. 1999) (holding, in a post-*College Savings* case, that a state did not consent to suit for CERCLA violations by operating a prison that had released toxic chemicals).

The commissions in our cases argue that the Court's decision in *College Savings* has eliminated all so-called "constructive" or "implied" waivers. We, however, cannot agree with their assessment of that case. The Court in *College Savings* limited its abandonment of "constructive" or "implied" waivers to the "ill conceived" "constructive-waiver experiment of *Parden*." *College Savings*, 527 U.S. at 680. Indeed, the Court did not call into question other types of "constructive" waivers obtained by Congress acting within its Article I powers. Rather, the Court simply held that states cannot "constructively" waive their immunity by being forced by Congress to choose between preserving their sovereign immunity and engaging in an "otherwise lawful activity." *Id.* at 687.

To illustrate the types of "constructive" waivers that Congress may still obtain from states, the Court provided two examples of constructive waivers that are "fundamentally different" from Parden-style waivers and that are viable after *College Savings*. *Id.* at 686. In the first example, *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 3 L. Ed. 2d 804, 79 S. Ct. 785 (1959), Congress required Tennessee and Missouri to waive their immunity as a condition for Congress' approval of the interstate compact made between the two states. The Court in *College Savings* explained that the constructive waiver exacted by Congress in that case was valid because, under the Compact Clause of the Constitution, states cannot form interstate compacts without congressional approval. As the Court explained it, Congress' consent to an interstate compact is a "gratuity" that Congress could give or withhold. *College Savings*, 527 U.S. at 686.

In the second example, *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987), the Court held that Congress could impose conditions on a state's acceptance of federal funds allocated under the Spending Power. In *Dole*, Congress had conditioned the allocation of federal highway funds on South Dakota's raising its drinking age. The Court in *College Savings* explained that its holding in *Dole* made clear that "Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." *College Savings*, 527 U.S. at 686. Just as it was a "gratuity" for Congress to approve an interstate compact, the Court in College Savings noted that federal funds were a "gift" from Congress that it was under no obligation to give. *Id.* at 686-87.

Because the Court in *College Savings* endorsed some kinds of "constructive" waivers, we cannot accept the commissions' argument that all constructive waivers are now foreclosed. We instead understand the Court's holding in *College Savings* to set boundaries for congressional attempts to obtain waivers from states. *See id.* at 690 (stating that "our opinion today has sought to discern what the bounds [of federal power] are"). In *Seminole Tribe*, the Court had held that Congress could not abrogate state sovereign immunity through the exercise of its Article I powers. *Parden*-style waivers--in which a state was deemed to have waived its immunity simply by engaging in an activity regulated by Congress in the exercise of its Article I powers--nevertheless effectively allowed Congress to circumvent the holding of *Seminole Tribe*. *See id.* at 683. As the Court explained in *College Savings*, the type of "forced waiver" exacted by Congress under *Parden*, whereby the state is threatened with the sanction of waiving its immunity if it engages in a regulated enterprise, was really an abrogation

of the state's immunity prohibited by *Seminole Tribe*. *See id.* (noting that forced waiver and abrogation are "the same side of the same coin"); *see also Chavez v. Arte Publico Press*, 204 F.3d 601, 604 n.5 (5th Cir. 2000) ("*College Savings* expressly overruled *Parden* and its implied waiver theory. That theory is no longer available to support an Article I *abrogation* of Eleventh Amendment Immunity." (emphasis added) (citation omitted)). The Court's decision in *College Savings* closed the "forced waiver" loophole left open by *Parden*.

With these principles in mind, we shall now turn to the cases before us to examine whether there is a valid waiver.

3.

We first examine, as a threshold matter, whether Congress, in inviting the states to waive their Eleventh Amendment immunity, has done so with sufficient clarity. When it intends to obtain a waiver of immunity from the states, Congress must "speak with a clear voice" so that the states may exercise their choice to waive their immunity "knowingly, cognizant of the consequences of their participation." *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17, 67 L. Ed. 2d 694, 101 S. Ct. 1531 (1981) ("*Pennhurst I*"); *accord Atascadero*, 473 U.S. at 238-40 (stating that the Court has required "an unequivocal expression of congressional intent" to obtain an Eleventh Amendment waiver from states (citation omitted)); *see also Dole*, 483 U.S. at 207 (quoting *Pennhurst I* and stating that Congress must state the condition "'unambiguously'").

The commissions submit that there can be no waiver of sovereign immunity in these cases because the language of the 1996 Telecommunications Act contains no clear and unambiguous expression of Congress' intent to condition the states' participation in the Act's regulatory scheme on

their consent to suit in federal court. The commissions point out that the Act does not even mention sovereign immunity or indicate an intent to give states a choice between carrying out their responsibilities under the Act or retaining their sovereign immunity by letting the FCC fulfill their responsibilities. The absence of these elements from the statutory language negates, in the commissions' view, any possibility of a valid waiver; the statutory language contains no explicit manifestation that Congress clearly intended to condition the states' participation under the Act on their waiver of sovereign immunity.

We cannot accept this argument. Although the language of the statute does not contain the express waiver language that the commissions seek, the structure of the pertinent section of the statute, notably 47 U.S.C. § 252 (Supp. II 1996), nevertheless makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place. Section 252 first describes the duties of the carriers seeking to enter into an interconnection agreement and then details the role of the state commissions in the mediation, arbitration and review process. It sets forth the standards by which the state commissions may impose terms upon the parties to the interconnection agreements during arbitration as well as the standards by which the state commissions must approve or reject an agreement. Subsection 252(e)(5) then provides that, if a state commission does not carry out its responsibilities under § 252, the FCC will act in place of the state commission. Subsection 252(e)(6), titled "Review of State commission actions," then provides that the exclusive remedy for a state commission's failure to act will be the proceedings before the FCC and any judicial review of the FCC's actions. It further provides that any party aggrieved by a state commission's determination under § 252 may obtain review "in an appropriate Federal district court to

determine whether the agreement or statement meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6) (Supp. II 1996).

Thus, under the terms of § 252, the state commission or, if that body chooses not to act, the FCC will exercise regulatory authority over interconnection agreements. That administrative action, whether taken by a state administrative tribunal or by the FCC, is subject to review in federal court. If the reviewing body is a state commission, the statute provides that the commission's actions are reviewable in federal court under subsection 252(e)(6); if the reviewing body is the FCC, its actions are reviewable in federal court under 28 U.S.C. § 2342(1). In short, Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court. We therefore conclude that the 1996 Telecommunications Act satisfies the requirement that Congress clearly state that participation by the state in the regulatory scheme entails a waiver of immunity from suit in federal court. *Accord MCI Telecomms. Corp. v. Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, No. 99-4203, 2000 WL 783382, at *8 (10th Cir. June 20, 2000) (concluding that § 252 puts states on notice that Congress intends to subject them to suit in federal court if they act under § 252).

4.

We now turn to the question of whether the states have unequivocally waived their Eleventh Amendment immunity. As the Supreme Court has noted, there is "a fundamental difference" between "Congress's expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived [its] immunity" and "a State's expressing unequivocally that it waives its immunity." *College Savings*, 527 U.S. at 680-81. Therefore, we

must determine whether the states made a clear declaration that they desired to waive their immunity.

The carriers do not contend that Illinois or Wisconsin waived their immunity by statute. Rather, they maintain that these states have waived their Eleventh Amendment immunity by accepting the federal government's invitation to act as regulators of the local telephone market in accordance with § 252 of the 1996 Telecommunications Act. We agree with that assessment and therefore hold, as the Tenth Circuit held in *MCI Telecommunications Corp. v. Public Service Commission*, 2000 U.S. App. LEXIS 14348, No. 99-4203, 2000 WL 783382, (10th Cir. June 20, 2000), that states voluntarily waive their sovereign immunity by accepting that invitation.

The commissions endeavor to distinguish the *Petty*- and *Dole*-style waivers endorsed by the Supreme Court in *College Savings* from the situations in the cases before us. According to the commissions, the waivers obtained by the 1996 Telecommunications Act are fundamentally different than those in *Petty* and *Dole*. They point out that Petty involved Congress' Compact Power and *Dole* its Spending Power, while the 1996 Telecommunications Act is an exercise of Congress' Commerce Power. We do not believe that this distinction is helpful to the analysis required by *College Savings*. In *College Savings*, the Supreme Court's analysis did not hinge on whether Congress was acting within its Commerce or Spending or Compact Powers, all of which are Article I powers. Rather, the validity of a purported waiver turns on whether the waiver is conditioned on the state's truly voluntary acceptance of a federal "gratuity." *Accord Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *19, 2000 WL 783382, at *7 ("For a constructive waiver of sovereign immunity to be valid under *College Savings Bank*, it must be altogether voluntary and not forced from a state by Congress."). The significant commonality between *Dole* and *Petty* is *not* that each

involved a power other than the Commerce Power, the key in those cases was that Congress had the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take.

It is clear that Congress, in exercising its Commerce Power, *could* determine that all regulation of the telecommunications industry ought to be entrusted to the federal government. *See F.E.R.C. v. Mississippi*, 456 U.S. 742, 764, 72 L. Ed. 2d 532, 102 S. Ct. 2126 (1982) ("The commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities."); *Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8. And with the 1996 Telecommunications Act, we believe it equally clear that Congress *did* take over some aspects of the telecommunications industry. *See AT&T Corp.*, 525 U.S. at 378-79 n.6 (stating that, as to those aspects addressed by the 1996 Telecommunications Act, Congress has "unquestionably" taken the regulation of local telecommunications competition away from the states); *Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8. Although Congress cannot abrogate state sovereign immunity by exercising its Article I powers, *see Seminole Tribe*, 517 U.S. at 72-73, and cannot "commandeer" state regulatory agencies with legislation forcing them to regulate on behalf of Congress, *see Printz v. United States*, 521 U.S. 898, 935, 138 L. Ed. 2d 914, 117 S. Ct. 2365 (1997); *New York v. United States*, 505 U.S. 144, 168, 120 L. Ed. 2d 120, 112 S. Ct. 2408 (1992), these limitations on congressional power do not prohibit Congress from obtaining a state's voluntary consent to federal jurisdiction. With the 1996 Telecommunications Act, Congress has created a complex federal regulatory scheme for many aspects of the telecommunications industry. One component of that scheme is the invitation from Congress to the states to participate in the federal regulation of interconnection agreements and other aspects of the local telephone market.

Congress certainly had the power to take up the regulation of these areas on its own, and it certainly can invite the states to act on its behalf in carrying out those regulatory functions.

After the 1996 Telecommunications Act, the regulation of interconnection agreements and the approval of SGATs are no longer, in the terms employed by the Supreme Court in *College Savings*, "otherwise permissible activities" for the states. 527 U.S. at 687; *cf. Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *23-24, 2000 WL 783382, at *8 ("With the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity."). Congress, exercising its authority to regulate commerce has precluded all other regulation except on its terms. Unlike the situation in *Parden* and in *College Savings*, the states are not merely acting in an area regulated by Congress; they are now voluntarily *regulating on behalf of Congress.*[8] Unlike the situation in *Parden*, in which Alabama exercised its sovereign authority to operate a railroad, the state commissions have conducted arbitrations for interconnection agreements, have approved and enforced those agreements, and have acted on an SGAT under a federal grant of power. Their authority to act was derived from provisions of the Act and not from their own sovereign authority.

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[8] *See also Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, *21, 2000 WL 783382, at *8 (" 47 U.S.C.A. § 252 invites states to participate in the federal government's regulation of local telephone service."); Peter W. Huber et al., *Federal Telecommunications Law* § 3.3.4, at 227 (2d ed. 1999) ("As a backdrop to its primary reliance on privately negotiated agreements, however, Congress enlisted the aid of state public utility commissions to ensure that local competition was implemented fairly and with due regard to the local conditions and the particular historical circumstances of local regulation under the prior regime.").

The commissions submit that the waivers in our cases cannot be likened to the kind of waiver obtained by Congress in the exercise of its Spending Power. This is so, the commissions tell us, because with Spending Clause waivers the states effectively enter into a "contract" with Congress--in exchange for the federal funding, the state agrees to the terms offered by Congress. We think that the commissions' analogy, however, tends to support, rather than weaken, our conclusion. The state commissions have entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms.[9] The only difference between the classic example of a Spending Clause gratuity of federal funds and the waivers in our cases is that, with the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a "deputized" federal regulator. In exchange for this grant of regulatory power, Congress has required the states to agree to submit to federal jurisdiction to review their actions. In *Dole*, the gratuity was money; the condition was a higher drinking age. Here, the gratuity is federal regulatory power; the condition is waiver of the state's immunity. Having accepted the regulatory power offered by Congress, Illinois and Wisconsin now must accept the condition that was attached to that grant of power. *Cf. Board of Educ. of Oak Park v. Kelly E.*, 207 F.3d 931,

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[9] *Cf. Litman v. George Mason Univ.*, 186 F.3d 544, 555 (4th Cir. 1999) (holding that a public university had waived its immunity by accepting Title IX funding and thus agreeing to the condition of waiver Congress had attached to those funds), *cert. denied*, 145 L. Ed. 2d 1120, 120 S. Ct. 1220 (2000); *In re Innes*, 184 F.3d 1275, 1284 (10th Cir. 1999) (holding that a state had waived voluntarily its immunity by agreeing to participate in the federal Perkins Loan Program, a federal program in which states are required to undertake certain actions in federal bankruptcy court proceedings), *cert. denied*, 146 L. Ed. 2d 345, 120 S. Ct. 1530 (2000).

935 (7th Cir. 2000) (noting that "one string attached to money under the IDEA is submitting to suit in federal court" and holding that "having accepted the money, [states] must litigate in federal court"), *petition for cert. filed*, 69 U.S.L.W. 3001 (U.S. June 16, 2000) (No. 99-2027).[10]

We believe that *College Savings* does not alter the principle that states may waive their immunity by accepting a benefit from Congress that has conditions attached to that acceptance.[11] Congress could--and did--take over regulation

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[10] It has been suggested to us that the commissioners do not have the power to waive the immunity of their respective states; that only the state legislatures can waive their states' Eleventh Amendment immunity. We believe, however, that the waivers of immunity have come from the states themselves (and not the commissions). It is the states that have authorized the commissions to regulate the telecommunications industry, *see* Ill. Comp. Stat. 5 2-101; Wis. Stat. § 196.02, and, despite the clear warning from Congress in subsection 252(e)(6) of the 1996 Telecommunications Act, neither Illinois nor Wisconsin have taken any steps to forbid their respective commissions from exercising the authority granted to them by Congress. Indeed, the states have agreed unmistakably and affirmatively to waive their immunity. By accepting the grant of regulatory power offered by Congress, and by allowing the state commissions to exercise that power, Illinois and Wisconsin cannot contend now that they are not bound by the conditions attached to that grant of power.

[11] At one time, privately negotiated agreements were at issue in a case before us. But as we have explained, *supra* note 3, we have granted Ameritech Illinois' motion to remand 98-2256 to the district court for a voluntary dismissal with prejudice. We therefore need not decide--and reserve for another day--whether a state commission might have no true choice but to involve itself in the review process of a privately negotiated interconnection agreement in order to avoid the consequence of having the agreement be "deemed approved" under 47 U.S.C. § 252(e)(4) (Supp. II 1996). *Cf. College Savings*, 527 U.S. at 687 (stating that, in some instances, the inducement offered by Congress might be so coercive that the voluntariness of the waiver is destroyed).

of a part of the telecommunications industry in accordance with its Commerce Power. Such regulation is no longer an "otherwise permissible activity" for states. Congress may choose to "give back" to states some of the regulatory power Congress has taken away, and Congress may attach conditions to the return of that power. *Cf. College Savings*, 527 U.S. at 686-87 (explaining that, when Congress bestows a gift or gratuity, it may attach conditions to a state's acceptance of that gift or gratuity). States are free to accept or reject the terms Congress has offered the states if they want a continued role in regulating this segment of the local telephone service market.[12]

D. *Ex parte Young*

1.

As an independent basis for decision, we also believe that the Eleventh Amendment does not bar the carriers from pursuing injunctive relief against the individual members of the state commissions. Under the *Ex parte Young* doctrine, a

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[12] We are not unmindful that our colleagues in the Sixth Circuit have expressed the view that, in light of the Supreme Court's decisions in *College Savings* and *Florida Prepaid*, "it is virtually certain that a state utility commission's decision to accept regulatory authority under the [1996 Telecommunications Act] cannot legitimately be construed as a valid waiver of sovereign immunity." *GTE North, Inc. v. Strand*, 209 F.3d 909, 922 n.6 (6th Cir. 2000); *see also Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 & n.2 (6th Cir. 2000) (declining to find that the state had waived its immunity by regulating under the Act and instead relying on the *Ex parte Young* doctrine to allow suits against individual state commissioners), *petition for cert. filed*, 68 U.S.L.W. 3742 (U.S. May 15, 2000) (No. 99-1878). As we have already indicated, however, we believe that the Court of Appeals for the Tenth Circuit has expressed the correct view, and we agree with its analysis. *See Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *8.

private party may sue individual state officials in federal court to obtain prospective relief for an ongoing violation of federal law. *See Ex parte Young*, 209 U.S. at 159-60; *Idaho v. Coeur d' Alene Tribe*, 521 U.S. 261, 294, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (O'Connor, J., concurring); *id.* at 298-99 (Souter, J., dissenting) ("The plaintiff must allege that the officers are acting in violation of federal law, and must seek prospective relief to address an ongoing violation, not compensation or other retrospective relief for violations past." (internal citation and footnote omitted)); *Marie O.*, 131 F.3d at 615. Under this doctrine, federal courts are enabled to "vindicate federal rights and hold state officials responsible to 'the supreme authority of the United States.'" *Pennhurst II*, 465 U.S. at 105 (quoting *Ex parte Young*, 209 U.S. at 160).[13] The Supreme Court's decisions in *Alden*, *College Savings* and *Florida Prepaid* have not called the *Ex parte Young* doctrine into question. Indeed, the Court in *Alden* reaffirmed the doctrine's role in the sovereign immunity context. *See Alden v. Maine*, 527 U.S. 706, 748, 144 L. Ed. 2d 636, 119 S. Ct. 2240 (1999) (calling the *Ex parte Young* doctrine an "essential" part of the Court's sovereign immunity jurisprudence).

We agree with the Sixth and Tenth Circuits that these suits are "straightforward" *Ex parte Young* cases. *Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9 (holding that state commissioners may be sued under the *Ex parte Young* doctrine for their approval and enforcement of a § 252 interconnection agreement); *Michigan Bell Tel. Co.*, 202 F.3d at 867 (same). The carriers seek injunctive relief from what they allege to be determinations made by the commissioners that are contrary to the 1996 Telecommunications Act. The commissioners argue that, if any violations occurred, they occurred in the past, and that

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[13] The *Ex parte Young* doctrine may not be used to enjoin violations of state law. *See Pennhurst II*, 465 U.S. at 106.

therefore the *Ex parte Young* doctrine should not apply. We cannot accept this argument. The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. *See Entergy, Arkansas, Inc. v. Nebraska*, 210 F.3d 887, 898 (8th Cir. 2000) ("While the relief granted under *Ex parte Young* may only be prospective, proof for the claim necessitating relief can be based on historical facts, and most often will be."). Such relief is precisely the type contemplated by the *Ex parte Young* doctrine. Thus, the carriers' suits fit squarely within the traditional framework of *Ex parte Young*.

2.

The commissioners submit that the Supreme Court's decision in *Seminole Tribe* renders the *Ex parte Young* doctrine inapplicable to the cases before us. In *Seminole Tribe*, the Supreme Court admonished that "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. According to the commissioners, Congress has created in § 252 a "detailed remedial scheme" that is on par with the remedial scheme at issue in *Seminole Tribe*. Consequently, the commissioners argue, an *Ex parte Young* suit against them would run afoul of the Court's decision in *Seminole Tribe*.

We cannot accept the commissioners' characterization of the available remedies under the 1996 Telecommunications Act and, consequently, find their analogy to the situation in *Seminole Tribe* to be flawed. Section 252 of the Act does not create a "detailed remedial scheme" that manifests Congress' intent to limit the scope of

statutory remedies available to parties aggrieved by the commissioners' interconnection determinations. The enforcement provision implicated in our cases merely states: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 [and section 252]." 47 U.S.C. § 252(e)(6) (Supp. II 1996). The power of the court under subsection 252(e)(6) stands in stark contrast with the court's powers to impose what the Supreme Court called a "modest set of sanctions" under the statute at issue in *Seminole Tribe*. *Seminole Tribe*, 517 U.S. at 75.

In *Seminole Tribe*, the Court addressed the judicial enforcement scheme created by the Indian Gaming Regulatory Act ("the IGRA"). Congress had passed the IGRA in 1988 in order to provide a statutory framework for the operation and regulation of tribal gaming operations. Under the IGRA, Indian tribes could enter into the most heavily regulated class of gaming (*i.e.*, slot machines, casino games, banking card games, dog racing, and lotteries) only after certain conditions had been met. One of those conditions imposed by the IGRA was that the tribe's operations had to conform to a valid compact between the tribe and the state in which the gaming operations were located. *See* 25 U.S.C. § 2710(d)(1).

The IGRA set forth the process by which tribes and states were to enter into these compacts. First, a tribe was required to request that the state enter into compact negotiations. Once a request had been made, the state was obligated under the IGRA to "negotiate with the Indian tribe in good faith" to enter into a compact. *Id.* § 2710(d)(3)(A). Still other provisions of the IGRA made the state's obligation to negotiate in good faith judicially enforceable. *See id.* § 2710(d)(7)(A)(i) and (B)(i). Other provisions set forth what the Supreme Court described as "an elaborate remedial

scheme" designed to ensure that a Tribal-State compact would be formed. *See id.* § 2710(d)(7)(B)(ii)-(vii).[14] Under this scheme, if the district court determined that the state had failed to negotiate in good faith, the IGRA only allowed the court to issue an order mandating that the tribe and the state enter into a compact within 60 days. *See Seminole Tribe*, 517 U.S. at 74. If the parties disregarded this order, the only recourse available to the district court was to order each

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[14] To illustrate the elaborate nature of this remedial scheme, we shall set out the Supreme Court's full description of it: Sections 2710(d)(7)(B)(ii)-(vii) describe an elaborate remedial scheme designed to ensure the formation of a Tribal-State compact. A tribe that brings an action under § 2710(d)(7)(A)(i) must show that no Tribal-State compact has been entered and that the State failed to respond in good faith to the tribe's request to negotiate; at that point, the burden then shifts to the State to prove that it did in fact negotiate in good faith. § 2710(d)(7)(B)(ii). If the district court concludes that the State has failed to negotiate in good faith toward the formation of a Tribal-State compact, then it "shall order the State and Indian Tribe to conclude such a compact within a 60-day period." § 2710(d)(7)(B)(iii). If no compact has been concluded 60 days after the court's order, then "the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact." § 2710(d)(7) (B)(iv). The mediator chooses from between the two proposed compacts the one "which best comports with the terms of the Act and any other applicable Federal law and with the findings and order of the court," *ibid.*, and submits it to the State and the Indian tribe, § 2710(d)(7)(B)(v). If the State consents to the proposed compact within 60 days of its submission by the mediator, then the proposed compact is "treated as a Tribal-State compact entered into under paragraph (3)." § 2710(d)(7)(B)(vi). If, however, the State does not consent within that 60-day period, then the Act provides that the mediator "shall notify the Secretary of the Interior" and that the Secretary "shall prescribe procedures under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction." § 2710(d)(7)(B)(vii). *Seminole Tribe*, 517 U.S. at 50.

party to submit a proposed compact to a mediator, who would then choose one. *See id.* at 74. And if the state refused to accept the compact chosen by the mediator, the IGRA provided that the mediator was to inform the U.S. Secretary of the Interior, who would then issue regulations to govern the tribe's gaming operations. *See id.* at 74-75.

Unlike the IGRA, in which "Congress chose to impose upon the State a liability that is significantly more limited than would be the liability imposed upon the state officer under *Ex parte Young*," *Seminole Tribe*, 517 U.S. at 75-76, Congress has not limited the court's remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act. We reach this conclusion guided by our decision in *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997). In *Marie O.*, a case decided in the wake of *Seminole Tribe*, we held that the Individuals with Disabilities Education Act ("the IDEA") did not contain an "explicit remedial scheme" that would prevent an *Ex parte Young* suit. *Marie O.*, 131 F.3d at 616. The IDEA section involved in that case empowered a district court to grant "'such relief as it determines is appropriate'" to ensure compliance with certain provisions of the IDEA. *Id.* (quoting 20 U.S.C. § 1480(1)). Importantly, we noted that the remedial measures available under the IDEA did not expressly limit the role of the district court in redressing complaints with regard to the IDEA. Similarly, subsection 252(e)(6) does not limit the role or the power of the district court. Quite the contrary, subsection 252(e)(6) is silent as to how a district court would enforce its ruling under that section. Thus, we hold that *Seminole Tribe* does not preclude an *Ex parte Young* suit against the state commissioners here.

3.

Nor can we accept the contention that the Supreme Court's decision in *Coeur d'Alene Tribe* bars *Ex parte Young* suits by the carriers against the commissioners. The

commissioners maintain that *Ex parte Young* suits against them would trammel "special sovereignty interests" of their states and, thus, should be precluded by *Coeur d'Alene Tribe*.

In *Coeur d'Alene Tribe*, a majority of the Court held that a federal court cannot grant prospective equitable relief under the *Ex parte Young* doctrine when that relief would implicate "special sovereignty interests" of the state and would be the "functional equivalent" to a form of legal relief otherwise barred by the Eleventh Amendment. *Coeur d' Alene Tribe*, 521 U.S. at 281-82. More precisely, the Court held that the *Ex parte Young* doctrine was inapplicable to the "particular and special circumstances" present in that case. *Id.* at 287. A majority of the Court held that the lawsuit against Idaho could not proceed under the *Ex parte Young* doctrine because the suit, in which the Coeur d'Alene Tribe sought to have the federal court divest the state of its ownership of land under Lake Coeur d'Alene, in essence would affect "Idaho's sovereign interest in its lands and waters" to a degree "fully as intrusive as almost any conceivable retroactive levy upon funds in its Treasury." *Id.* at 287; *see also id.* at 296 (O'Connor, J., concurring) (agreeing that the *Ex parte Young* doctrine should not be extended to reach the Tribe's claim "to quiet title to sovereign lands" because such a lawsuit is really a suit against the state). The Court explained that the Tribe's lawsuit could not proceed under the *Ex parte Young* doctrine because the suit was the "functional equivalent of a quiet title action which implicates special sovereignty interests." *Id.* at 281.

Illinois' and Wisconsin's interests in the regulation of telecommunications providers in their respective states cannot be equated with Idaho's interest in its land, which the Court in *Coeur d'Alene Tribe* found so fundamental. In the wake of the 1996 Telecommunications Act, any "sovereign" interest Illinois and Wisconsin may have in regulating interconnection agreements and SGATs is

derived solely from the regulatory role Congress has bestowed upon the states. Thus, the suits against the state commissioners to require compliance with the 1996 Telecommunications Act do not strike at core functions or fundamental powers of either Illinois or Wisconsin.[15] Therefore, the availability of an *Ex parte Young* suit in our cases is not affected by the special limitation recognized by a majority of the Court in *Coeur d' Alene Tribe. Accord Public Serv. Comm'n*, 2000 U.S. App. LEXIS 14348, 2000 WL 783382, at *9 n.8.

Conclusion

We hold that, by deciding to exercise the power delegated to them by the Act, the states agreed to the conditions attached to that grant of power and thereby waived their Eleventh Amendment immunity from suit in

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[15] *Compare J.B. ex rel. Hart v. Valdez*, 186 F.3d 1280, 1287 (10th Cir. 1999) (holding that "[a] state's interest in administering a welfare program at least partially funded by the federal government is not such a core sovereign interest as to preclude the application of *Ex parte Young*"), *and Branson Sch. Dist. RE-82 v. Romer*, 161 F.3d 619, 632-33 (10th Cir. 1998) (holding that an action, which was "the functional equivalent of a breach of trust action" against the state for planned changes to its management of public lands, was within the scope of the *Ex parte Young* doctrine because the relief sought would not alter the nature of the state's ownership in the land but would affect only the manner in which the state managed the lands at issue), *cert. denied*, 119 S. Ct. 1461 (1999), *with MacDonald v. Village of Northport*, 164 F.3d 964, 972 (6th Cir. 1999) (holding that a state's "great interest in maintaining access to the Great Lakes" was a "special sovereignty interest" that precluded an *Ex parte Young* suit), *and ANR Pipeline Co. v. LaFaver*, 150 F.3d 1178, 1193 (10th Cir. 1998) (holding that a state's power to tax is akin to the "special sovereignty interests" identified in *Coeur d'Alene Tribe*), *cert. denied*, 525 U.S. 1122, 142 L. Ed. 2d 902, 119 S. Ct. 904 (1999).

federal court. The federal regulatory scheme set forth in §§ 251 and 252 of the Act bestowed upon states a "gratuity." Acceptance of that federal invitation to share in the regulation of the telecommunications industry is conditioned on a waiver of Eleventh Amendment immunity. A state's decision to exercise that regulatory authority--which would otherwise lie with the federal government--necessarily constitutes a waiver of its immunity from suit in federal court.

We also hold that, under *Ex parte Young*, the Eleventh Amendment does not bar the carriers' lawsuits against the individual commissioners. Because the carriers have alleged ongoing violations of federal law and because they seek prospective equitable relief, their lawsuits fit squarely within the traditional framework of *Ex parte Young*. Moreover, the more recent limitations on *Ex parte Young* suits that the Supreme Court announced in *Seminole Tribe* and *Coeur d'Alene Tribe* are not applicable here. The 1996 Telecommunications Act does not contain a specific remedial scheme, and these lawsuits do not implicate special sovereignty interests.

Accordingly, we affirm the judgment of the district court in 98-2127. We reverse the judgment of the district court in 99-2805, 99-2806, 99-2811, 99-2873, and 99-2992, and we remand these cases to the district court for further proceedings consistent with this opinion.

98-2127 AFFIRMED;
99-2805, 99-2806, 99-2811, 99-2873 & 99-2992
REVERSED and REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

97-C-566-C

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and CHERYL L. PARRINO, DANIEL J. EASTMAN, and JOSEPH P. METTNER,

Defendants.

98-C-11-C

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and CHERYL L. PARRINO, DANIEL J. EASTMAN, and JOSEPH P. METTNER, in their official capacities as members of the Commission, and MCI TELECOMMUNICATIONS CORP. and MCI METRO ACCESS TRANSMISSION SERVICES, INC.,

Defendants,

UNITED STATES OF AMERICA,
Intervenor.

98-C-153-C

MCI TELECOMMUNICATIONS CORP., and MCI METRO ACCESS TRANSMISSION SERVICES, INC.,
Plaintiffs,

v.

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, and CHERYL L. PARRINO, DANIEL J. EASTMAN, and JOSEPH P. METTNER, in their official capacities as members of the Commission,
Defendants,

UNITED STATES OF AMERICA,
Intervenor.

98-C-366-C

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN,
Plaintiff,

v.

TCG MILWAUKEE, INC., PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO and JOSEPH P. METTNER, Commissioners of the Public Service Commission of Wisconsin,
Defendants,

TIME WARNER COMMUNICATIONS OF MILWAUKEE, L.P.,

Intervenor.

November 25, 1998, Decided
November 25, 1998, Opinion Filed

Before BARBARA B. CRABB, *District Judge.*

CRABB, *District Judge*

These four civil actions are brought pursuant to the Telecommunications Act of 1996. At the heart of each lies a ruling of defendant Public Service Commission of Wisconsin issued under the auspices of the Act. In essence, the actions are appeals of the commission's rulings. Defendants in all the cases are the commission and its members, who are named in their official capacities only. The actions are before the court on motions filed by defendants in each case to dismiss on Eleventh Amendment immunity grounds. To expedite resolution of the motions, I will address the Eleventh Amendment issue in a single opinion.

The following Eleventh Amendment analysis is complex, in part because the Telecommunications Act calls for a unique sharing of federal and state regulatory power, and in part because one recent Supreme Court decision involving the Eleventh Amendment, *Seminole* Tribe of *Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), has raised many questions about the current status of Eleventh Amendment immunity and has spurred a "lively debate in judicial and academic circles." *See Gorka v. Sullivan*, 82 F.3d 772, 774 (7th Cir. 1996). In the end, although I agree with defendants that they are entitled to

immunity, a ruling on their motion to dismiss must be stayed temporarily. The parties have not addressed adequately whether defendants' entitlement to immunity requires that these actions be dismissed in their entirety or go forward without defendants.

The few facts material to defendants' Eleventh Amendment claim are undisputed. Underlying each of the cases are rulings that the commission issued on matters relating to the provision of local telephone service in Wisconsin. Cases 98-C-11-C, 98-153-C and 98-C-366-C involve the commission's rulings on certain "interconnection agreements." Case number 97-C-566-C involves a ruling on a "statement of generally available terms and conditions." (These terms will be defined later.) In all four cases, the commission's determinations are alleged to be inconsistent with the Telecommunications Act of 1996.

On the Eleventh Amendment issue, the parties may be placed in two camps. One consists of defendant commission and its members, defendants Cheryl L. Parrino, Daniel J. Eastman[16] and Joseph P. Mettner. With one voice, they contend that they are entitled to Eleventh Amendment immunity.

The other camp's constituents are more diverse. They include Wisconsin Bell, Inc., MCI Telecommunications Corporation, MCI Metro Access Transmission Services, Inc., and TCG Milwaukee, Inc. These firms provide telephone services in Wisconsin and are parties to various interconnection agreements that were the subject of proceedings before defendant commission. In addition, Wisconsin Bell submitted a statement of generally available terms and conditions that was modified by the commission. Also in this camp are two intervenors. In 98-C-11-C, the United States has weighed in solely on the Eleventh

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[16] Daniel J. Eastman is not a defendant in 98-C-366-C.

Amendment issue; in 98-C-366-C, Time Warner Communications of Milwaukee, L.P., another telecommunication firm, has weighed in on immunity and the merits. Although the telecommunications firms in this camp have different views on the merits, they and the federal government all contend that the Eleventh Amendment is not a bar to proceeding against either defendant commission or its members. Moreover, although they advance different reasons for rejecting defendants' motion to dismiss, they all oppose the motion. For this reason, I will present their arguments collectively and refer to them as "plaintiffs" to simplify the discussion.

Further description of the parties and the facts of the underlying rulings is immaterial to the motion to dismiss, but background information about the Telecommunications Act of 1996 is essential. Plaintiffs and defendants devote substantial portion of their briefs to describing relevant provisions of the Act. This information may be fairly summarized as follows.

BACKGROUND

A central goal of the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, (codified in scattered sections of Title 47 of the United States Code), is to "erode the monopolistic nature of the local telephone service industry." *See Iowa Utilities Board v. FCC*, 120 F.3d 753, 791 (8th Cir. 1997), *cert. granted*, 118 S. Ct. 879 (1998). The breakup of AT &T brought many new entrants to the long distance market; for the most part, however, local markets remained under the dominance of single firms. In 1996, an estimated 92% of the local service market was controlled by ten firms that did not compete in any market. Morever, the local telephone market is roughly three times the size of the long distance market: $ 95 billion versus $ 31 billion in annual revenue. Hence, Congress recognized that transition from the regulated monopoly paradigm to a competition-

oriented paradigm could have tremendous consumer benefit. *See* Duane McLaughlin, Note, *FCC Jurisdiction Over Local Telephone Under the 1996 Act: Fenced Off?*, 97 Colum. Law. Rev. 2210 (1997).

To move toward a competitive model, Congress forced existing local providers to share their equipment and services with new entrants. The linking of a new entrant to an existing or "incumbent" carrier's equipment is known as "interconnection." *See Iowa Utilities*, 120 F.3d at 791. In legal terms, Congress required interconnection by imposing specific duties on incumbent carriers. For example, incumbents are obliged to negotiate in good faith with new market entrants requesting interconnection, *see* § 251(c)(1), and must allow new entrants to resell the services that they may buy from the incumbent. *See* § 251(c)(4).

Incumbents and new entrants may enter interconnection agreements voluntarily. *See* § 252(a)(1). If necessary, a party to an interconnection negotiation may petition the state's utility commission to mediate. *See* § 252(a)(2). Finally, if negotiations are unsuccessful after 135 days, a party may petition the state commission to arbitrate unresolved matters. *See* § 252(b)(1).

All interconnection agreements are subject to review by the state commission whether they are arrived at voluntarily or through mediation or arbitration:

> Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

§ 252(e)(1). The grounds upon which a state commission may reject an agreement include the potential for

discrimination against third party carriers and inconsistency with the public interest. *See* § 252(e)(2)(A).

The Act provides a remedy in the event that a state commission fails to act on a matter related to an interconnection agreement:

> If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the [Federal Communication] Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

§ 252(e)(5). FCC intervention is not automatic, however. Under the Act, interconnection agreements are deemed approved if the state commission does not act on a voluntary or mediated agreement within 90 days or on a arbitrated agreement within 30 days. *See* § 252(e)(4). Under FCC regulations, if an agreement is "approved" because the state commission did not take action, a state commission has not "failed to act" and the FCC does not intervene. *See* 47 C.F.R. § 51.801(c). As a result, under the regulations, the FCC acts in place of a state commission only if the state commission fails to respond to a request for mediation or arbitration. *See id.* § 51.801(b).

Another aspect of the Telecommunications Act is that firms limited traditionally to providing local service are permitted to enter long distance markets. Contingent upon the opening of its local markets to new entrants, which is marked by the existence of approved interconnection agreements, *see* § 271(c)(1)(A), a local carrier that was part of the old Bell system is entitled to enter the long distance

market within its state. *See* § 271(b). Alternatively, if there has been no request for interconnection, old Bell system members may enter this part of the long distance market if they receive the state commission's approval of a "statement of the terms and conditions that the company generally offers to provide such access." *See* § 271(c)(1)(B); *see also* § 252(f). The statement sets out the contractual terms that will apply to any future interconnection agreement.

Historically, state and federal government shared the duty to regulate the monopolies that provided local and long distance telephone service. The Telecommunications Act of 1934 set out a dual regulatory model under which the states' public utility commissions had authority over the *intra*state market and the FCC had authority over the *inter*state market. *See* Jim Chen, *The Legal Process and Political Economy of Telecommunications Reform*, 97 Colum. L. Rev. 835, 837-84 (1997).

State commissions continue to have a significant role in the regulation of local telephone service under the 1996 Telecommunications Act: one, they are responsible for mediating and arbitrating disputes between parties over the formation of interconnection agreements, *see generally* §§ 252(a), (b); two, they are required to review any resulting interconnection agreement, *see* § 252(e)(1); three, they must review statements of generally available terms, *see* § 252(f)(2); and four, they retain the primary authority to enforce the substantive terms of interconnection agreements, *see Iowa Utilities Board*, 120 F.3d at 804. Nonetheless, the state commissions' authority over local telephone service is not exclusive. The FCC has conditional authority to act for a state commission that fails to act. Also, the federal district courts have jurisdiction to review determinations of the state commissions under § 252(e)(6), which provides:

(6) Review of State commission actions

In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

Under the Act, federal judicial review is the sole remedy to correct errors in determinations related to interconnection agreements. State judicial review is barred: "No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section." § 252(e)(4).

OPINION

I. ELEVENTH AMENDMENT IMMUNITY

A. Introduction

Generally, the Eleventh Amendment divests federal courts of jurisdiction over suits brought by private parties against a state. *See Marie O. v. Edgar*, 131 F.3d 610, 614 (7th Cir. 1997). There are three well-recognized exceptions to this limitation on federal jurisdiction: 1) Congress may abrogate the states' Eleventh Amendment immunity; 2) a state may waive its Eleventh Amendment immunity and consent to suit in federal court; and 3) pursuant to *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), individuals may sue state officials to obtain prospective injunctive relief to

remedy ongoing violations of federal law. *See Marie O.*, 131 F.3d at 615.

Plaintiffs contend that jurisdiction exists pursuant to both the general federal question statute, 28 U.S.C. § 1331, and 47 U.S.C. § 252(e)(6), which provides that any party "aggrieved" by the determination of a state commission "may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." There is no real dispute that defendant commission is an arm of the state of Wisconsin. Thus, the general rule of Eleventh Amendment immunity applies. However, plaintiffs contend that the state of Wisconsin waived its Eleventh Amendment immunity by choosing to participate in the arbitration and review of interconnection agreements and by choosing to review a statement of generally available terms and conditions. Alternatively, they contend that under *Ex Parte Young*, the actions may go forward against defendant commission members to prevent them from enforcing their rulings to the extent that they are inconsistent with the Act.

B. Abrogation

A brief discussion of abrogation in the context of the Act serves as a useful starting point to the analysis of plaintiffs' contentions. "Congress may constitutionally abrogate the States' Eleventh Amendment immunity under a particular statute if it both unequivocally expresses its intent to do so and acts pursuant to a valid exercise of power." *Varner v. Illinois State University*, 150 F.3d 706, 708 (7th Cir. 1998). It is uncontested that Congress enacted the Telecommunications Act pursuant to its authority to regulate interstate commerce. *See* § 151 (regulation of "interstate and foreign commerce in communication" ensures fast and efficient telecommunication services available nationwide). When President Clinton signed the

Act on February 8, 1996, it appeared that the commerce clause provided Congress with authority to abrogate the states' Eleventh Amendment immunity. Seven years earlier, a majority of Supreme Court Justices had ruled in separate opinions that the commerce clause did supply such authority to Congress. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 23, 105 L. Ed. 2d 1, 109 S. Ct. 2273 (1989)(plurality opinion); *id.* at 57 (White, J. concurring).

Hardly had the President's signature dried when the Supreme Court overruled *Union Gas*, which meant that the commerce clause no longer provided Congress the authority to abrogate the states' immunity. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996). The Seminole Tribe had sued the state of Florida and its governor in federal court, seeking to require the state to participate in negotiations to allow gaming as prescribed under the Indian Gaming Regulatory Act. Florida had contended that it was immune from a claim brought under the act. See id. at 51-52. A five justice majority concluded that Florida was entitled to immunity. Congress had legislated the Indian Gaming Regulatory Act under authority of the Indian commerce clause, which the Supreme Court held to be an insufficient basis for abrogation. The Court overruled *Union Gas* to the extent it had held that the closely related interstate commerce clause gave Congress abrogation power. *See id.* at 66, 72-73. In light of *Seminole*, Congress's probable intention simply to abrogate the states' Eleventh Amendment immunity through enactment of the Telecommunications Act is of no effect.

C. Waiver

In contending that Wisconsin waived its Eleventh Amendment immunity, plaintiffs do not argue that Wisconsin did so expressly through state legislation. *Compare Port Authority Trans-Hudson Corporation v. Feeney*,

495 U.S. 299, 306-309, 109 L. Ed. 2d 264, 110 S. Ct. 1868 (1990) (New York and New Jersey statutes reveal the states' intent to be subject to suit in federal court for claims arising out of interstate transportation compact). Instead, they rely on the doctrine of "constructive" or "implied" waiver, under which Congress may condition a state's participation in a federally regulated activity upon the state's waiver of immunity from lawsuits arising out of the activity. *See Close v. State of New York*, 125 F.3d 31, 39 (2d Cir. 1997) (summarizing the doctrine); *see also* Erwin Chemerinsky, *Federal Jurisdiction*, § 7.6 at 410 (2d ed. 1994) (*citing Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985) and John R. Pagan, *Eleventh Amendment Analysis*, 39 Ark. L. Rev. 447 (1986)). In a nutshell, plaintiffs contend that the public service commission chose voluntarily to become involved in the interconnection process and in so doing, consented to suit in federal court as prescribed by the Telecommunications Act.

The implied waiver doctrine has two criteria. The first is that federal law must provide notice to a state that its participation in an activity may subject the state to suit in federal court. *See Close*, 125 F.3d at 39 (Congress must evince "clear and unequivocal intent" to hold the states liable in federal court); *see also* Kit Kinports, *Implied Waiver after Seminole Tribe*, 82 Minn. L. Rev. 793, 800 (1998) (*Welch v. Texas Highways & Public Transportation Dept.*, 483 U.S. 468, 476-78, 97 L. Ed. 2d 389, 107 S. Ct. 2941 (1987), adopted "clear statement" rule for implied waivers). Just as Congress must express in clear language its intent to *abrogate* the states' immunity, *see Varner*, 150 F.3d at 708, Congress must use clear language when it conditions a state's participation in a federal program upon a waiver of the state's immunity.

I agree with plaintiffs that the Telecommunications Act satisfies this criterion. The provision establishing federal court jurisdiction to review state commission rulings,

entitled "Review of State commission actions," provides in full:

> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

47 U.S.C. § 252(e)(6). This provision provides clear notice to the states that their commissions will have to defend their rulings in federal court. Someone reading the language would know *who* will be involved in any proceedings and *where* those proceedings will occur. The first sentence of § 252(e)(6) makes it clear that state commissions might be sued: it says that there will be "judicial review of the *Commission's* actions." (Emphasis added). The second sentence reveals where they might be sued: it says that review will occur in the "appropriate *Federal* district court." (Emphasis added).

Defendants are wrong to label § 252(e)(6) as a mere "general authorization for suit in federal court," which is insufficient to confer immunity. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 246, 87 L. Ed. 2d 171, 105 S. Ct. 3142 (1985). In *Atascadero*, the issue was whether Congress abrogated the states' immunity in enacting the Rehabilitation Act. *See id.* at 242. The act included a provision creating a federal cause of action enforceable against "any recipient" of federal funds. Because the act did

not specify that the class of recipients subject to suit included the states, the Court held that the general authorization was insufficient to waive the states' immunity: "Given their constitutional role, the States are not like any other class of recipients of federal aid." *See id.* at 246. Section 252(e)(6) is far from the provision held insufficient in Atascadero. It specifies in clear terms that states will be subject to suit and that they will be subject to suit in federal court.

The constructive waiver doctrine's second criterion is that the state's participation in the federally regulated activity must be voluntary. *See Close*, 125 F.3d at 39. A state must have a realistic choice to avoid participating in the activity. *See id.* (*citing Chemerinsky*, § 7.6 at 410). Two Supreme Court decisions inform this inquiry: *Parden v. Terminal Ry. Co*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), and *Employees of the Dept. of Public Health & Welfare v. Department of Public Health & Welfare*, 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614 (1973) (Missouri Employees).

Parden involved personal injury claims arising under the Federal Employees Liability Act, which governs railways operating in interstate commerce. Several employees of Alabama's state-owned railway system brought suit in federal court seeking compensation from the state for work-related injuries. Alabama argued that the act did not apply to its state-run railway and alternatively, that it was entitled to immunity pursuant to the Eleventh Amendment. The Court rejected both contentions. In its discussion of immunity, the Court noted initially that Alabama began operating its railway *after* Congress enacted the Federal Employees Liability Act. Thus, the Court concluded, Alabama "necessarily consented" to being sued in federal court when it chose to enter the railway business. The Court reasoned that the commerce clause authorized Congress to regulate railway systems; "by enacting the FELA in the exercise of this power, Congress conditioned

the right to operate a railroad in interstate commerce upon amenability to suit in federal court as provided by the Act." *See Parden*, 377 U.S. at 192.

In *Missouri Employees*, 411 U.S. 279, 36 L. Ed. 2d 251, 93 S. Ct. 1614, employees of the state's mental health agencies brought a damage suit in federal court, contending that the state's overtime compensation rules violated the Fair Labor Standards Act. Although the original act did not apply to state employees, a 1966 amendment extended coverage to employees at state hospitals and educational institutions. The Missouri employees argued that like Alabama, Missouri had waived its Eleventh Amendment immunity; like Alabama, which chose to start a railway after railways became the subject of a federal law, Missouri chose to remain active in the field of mental health after the field became the subject of a federal law. The Court declined to extend its ruling in Parden, finding it significant that Alabama's ran its railway "'for profit.'" *See Missouri Employees*, 411 U.S. at 284 (*quoting Parden*, 377 U.S. at 185). Moreover, in a concurring opinion, Justice Marshall added that in contrast to Alabama, which had entered the railway business long after the enactment of federal law in that field, Missouri:

> was fully engaged in the operation of the affected hospitals and schools at the time of the 1966 amendments. To suggest that the State has the choice of either ceasing operation of these vital public services or "consenting" to federal suit, suffices, I believe, to demonstrate that the State did not voluntarily consent to the exercise of federal jurisdiction in this case.

Missouri Employees, 411 U.S. at 296 (Marshall, J., concurring, joined by Stewart, J.).

Lower courts and commentators have interpreted Missouri Employees to stand for the proposition that a state's continued involvement in "traditional government operations" cannot amount to a waiver of its Eleventh Amendment right not to be sued in federal court. *See Abril v. Commonwealth of Virginia*, 145 F.3d 182, 190 (4th Cir. 1998) (*citing Missouri Employees*, 411 U.S. at 284-85); *Digiore v. State of Illinois*, 962 F. Supp. 1064, 1074-75 (N.D. Ill. 1997) (Illinois's acceptance of federal traffic accident reduction funds not evidence that state consented to suit; Alabama's operation of railway in Parden "fundamentally distinct" from Illinois's policing of state highways); *Goebel v. State of Colorado*, 1996 U.S. Dist. LEXIS 20929, at *29-30, No. 93- K-1227 (D. Colo. Jun. 25, 1996) (state of Colorado entitled to Eleventh Amendment Immunity from state employees' claim for overtime pay in accordance with Fair Labor Standards Act; no real choice existed for Colorado if it had either to waive Eleventh Amendment immunity or disband much of its executive branch); Pagan, *Eleventh Amendment Analysis*, 39 Ark. L. Rev. at 495 (a state cannot choose to waive immunity unless it has realistic alternative; no state can abandon its responsibilities in education, public health and law enforcement) (*citing Missouri Employees*, 411 U.S. at 296 (Marshall, J., *concurring*)); but *see Carey v. White*, 407 F. Supp. 121, 123-125 (D. Del. 1976) (state of Delaware waived immunity from claims arising under Fair Labor Standards Act; state continued to operate mental hospital after federal law was extended to cover employees at state hospitals).

Plaintiffs contend that in the Telecommunications Act, Congress permitted a state commission to become involved in the arbitration, mediation and review of matters related to interconnection *provided* the states waived immunity to a federal lawsuit challenging the ruling of its commission. To plaintiffs, it is critical that state commissions may "opt out" of this regulatory role. They explain that under § 252(e)(4), if a state commission fails to act, the FCC assumes jurisdiction. *See* Br. of United States in

Opp'n to Motion to Dismiss, No 98-C-11-C, dkt. # 43, at 5. Thus, plaintiffs conclude, "The Wisconsin Commissioners cannot plausibly argue that they are entitled to exercise authority available to them solely through a delegation from Congress without accepting as well the condition attendant to its exercise -- that is, federal district court review of the conformity of their determinations applying federal law." *Id.* at 15. Moreover, plaintiffs cite many district court opinions that have applied the constructive waiver doctrine with respect to the review of state commission rulings under the Act. *See US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365, 1369 (W.D. Wash. 1997) (states are permitted, not required, to act as principal regulatory body; federal law is clear that states accepting congressional invitation are subject to judicial review in federal court); *see also Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817, 825-26 (W.D. Mich. 1998) (*citing US West Communications*, 971 F. Supp. at 1370, and eighteen other published and unpublished district court opinions).

With respect, I disagree with the reasoning of these courts that the doctrine of constructive waiver applies to the Telecommunications Act. I reach this conclusion after considering several factors.

a. Plaintiffs mischaracterize the nature of telecommunications regulation. It is not true that Congress devised a brand new role for the states when it enacted the Telecommunications Act of 1996. It acted against a backdrop of fifty years of regulatory history during which state commissions served as the primary regulators of local telephone service. Viewed correctly, the Telecommunications Act of 1996 *preserved* state regulatory power in this area. *See* Phillip Rosario and Mark F. Kohler, *The Telecommunications Act of 1996: A State Perspective*, 29 Conn. L. Rev. 331, 337-338 (1996); *see also Iowa Utilities Board*

v. FCC, 120 F.3d 753, 800 (8th Cir. 1997), cert. granted, 118 S. Ct. 879 (1998) (congressional grant of authority in 1996 Telecommunications Act allowing state commissions to set local pricing is consistent with states' historical role in regulation of local telephone service). The constructive waiver doctrine is not applicable when the federal government amends or enacts a law making a state subject to suit merely by continuing in existing activities that protect its citizens. See *Missouri Employees*, 411 U.S. at 296 (Marshall, J., concurring).

b. Plaintiff's contention that a state may opt out of duties under the Telecommunications Act is not entirely correct. True, if a state commission refuses to arbitrate or mediate a dispute, the FCC must step into the commission's shoes, *see* § 252(e)(5), but that is only half of the regulatory picture. If because a state desires to opt out of the Act, it fails to review a agreement that the parties arrived at voluntarily, the agreement is deemed approved automatically and the FCC does not act in place of the state commission. *See* § 252(e)(4); 47 C.F.R. § 51.801(c). Thus, a state commission must review a voluntary agreement or accept the consequence that the agreement will go into effect without any form of government oversight.

c. In the Telecommunications Act of 1996, Congress recognized that interconnection may affect local interests: an agreement may be rejected on grounds that it is "not consistent with the public interest, convenience and necessity." *See* § 252(e)(2)(A)(ii). It is true that the affirmative efforts of mediating and arbitrating interconnection agreements and reviewing statements of generally available terms and conditions are new tasks for state commissions. But overall, state commissions' charters to protect the public from telecommunications firms have not changed. Congressional authorization to reject interconnection agreements because they are inconsistent with the public interest proves that the transition from regulated monopoly

to competition has not eliminated the risk that local service providers may act contrary to the public interest. Thus, staying out of the interconnection process cannot be said to be a realistic option for a state commission. Unlike Alabama's decision to start a railway, a state does not enter into the "business" of regulating interconnection agreements. *Compare Parden*, 377 U.S. at 192.

For these reasons, I reject plaintiffs' contention that defendant commission waived its Eleventh Amendment immunity in these cases, although one other matter relating to constructive waiver warrants brief attention. Last month, the Fifth Circuit held that in the wake of *Seminole*, "Congress cannot condition states' activities that are regulable by federal law upon their 'implied consent' to being sued in federal court." Consequently, the court of appeals rejected a claim that, by operating a press at a state university, the state of Texas waived its Eleventh Amendment immunity to claims arising under the Copyright Act. *See Chavez v. Arte Publico Press*, 157 F.3d 282, 285-287 (5th Cir. 1998). Indeed, the issue whether *Seminole* quashed the doctrine of implied waiver is one part of the judicial and academic debate over the decision. *See Digiore*, 962 F. Supp. at 1075 (because *Seminole* rejected congressional attempts to expand federal jurisdiction using the commerce clause, continuing viability of Parden is "extremely questionable"); but *see Chavez*, 157 F.3d at 291 (Wisdom, J., *dissenting*) ("There is a place, although limited, for the *Parden* waiver doctrine after *Seminole*); *MCI Telecommunications v. Illinois Bell Telephone Co.*, 1998 U.S. Dist. LEXIS 4458, No. 97 C 2225, 1998 WL 156678, at *5-7 (N.D. Ill. Mar. 31, 1998) (*Seminole* did not invalidate doctrine of implied waiver); Kinports, *Implied Waiver after Seminole Tribe*, 82 Minn. L. Rev. at 795 (doctrine of implied waiver "retains validity after *Seminole* Tribe"). However, because I conclude that the doctrine is inapplicable on the merits, there is no need to contribute to the debate.

D. *Ex Parte Young*

Alternatively, plaintiffs contend *Ex Parte Young*, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908), gives them a solid basis on which to proceed against the members of defendant commission despite a conclusion that the commission itself is entitled to immunity. Plaintiffs argue that the Eleventh Amendment does not prevent this court from exercising jurisdiction over defendant commission members in their official capacities and granting prospective injunctive relief against these defendants to prevent them from committing further violations of the Telecommunications Act. In support, plaintiffs cite the great number of district courts that have found *Ex Parte Young* applicable in these circumstances. *See Michigan Bell Telephone Co. v. MFS Intelenet of Michigan, Inc.*, 16 F. Supp. 2d 817, 826-27 (W.D. Mich. 1998) (holding that *Ex Parte Young* applies and citing nineteen other published and unpublished federal court decisions to same effect).

Defendants deny that *Ex Parte Young* is applicable on various grounds, some of which may be described as technical. These include defendants' arguments that 1) the doctrine cannot apply because the acts related to interconnection are discretionary and the doctrine applies only in circumstances in which state officials perform ministerial acts; and 2) there is no ongoing violation of federal law because defendant commissioners have already made their rulings. Defendants' strongest contention is also their most ambitious. They attack the reasoning of the district courts that have found the doctrine applicable, arguing that these courts have not properly taken into account the other significant holding of *Seminole*: "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon

Ex Parte Young." *Seminole*, 517 U.S. at 74. Briefly, defendants contend that under *Seminole*, since Congress prescribed a remedy for state commissions' violations of the Telecommunications Act (a right to judicial review in federal court), the federal courts lack jurisdiction to proceed under *Ex Parte Young*.

In *Seminole*, after rejecting the tribe's contention that Congress abrogated the states' immunity in enacting the Indian Gaming Regulatory Act, the Court turned to the tribe's alternative contention that *Ex Parte Young* served as a means by which to obtain relief. The tribe contended that federal court jurisdiction existed to proceed in an action against the governor to obtain injunctive relief compelling him to participate in negotiations for a gaming compact as set forth in the act. The Court held the doctrine inapplicable. It reasoned that in contrast to the "modest set of sanctions" Congress established in the Indian Gaming Regulatory act, a suit under *Ex Parte Young* would expose the defendant state official to the "full remedial powers of a federal court." Also, allowing a suit for relief under *Ex Parte Young* would render ineffective the remedies Congress designed. The Court acknowledged that Congress has authority to establish federal court jurisdiction over state officials comparable to *Ex Parte Young* jurisdiction, but concluded that Congress had not applied such authority when it wrote the Indian Regulatory Gaming Act (In a footnote, number 17, the Court contrasted the Indian Gaming Regulatory Act, which uses the term "the State" repeatedly, to 42 U.S.C. § 11001, which requires "the Governor" of a state to establish an emergency response commission.) Of significance, the Court ruled that even though Congress's remedial scheme under the Indian Gaming Act did not work because it violated the states' Eleventh Amendment rights, the Court could not "rewrite the statutory scheme in order to approximate what we think Congress might have wanted." *See Seminole*, 517 U.S. at 74-76, 75 n.17.

The implications of *Seminole* are two-fold. One, Congress is capable of fashioning remedies for violations of the statutory rights it creates. In fact, footnote seventeen reveals that in fulfilling this legislative function, Congress may rely on *Ex Parte Young* and grant the federal courts jurisdiction to proceed in matters against certain state officials. Two, Congress is a superior legislator to the courts and its choice of remedy must be respected. This point was acknowledged in *Crawford v. Indiana Dept, of Corrections*, 115 F.3d 481 (7th Cir. 1997), in which the court of appeals cited *Seminole*'s discussion concerning *Ex Parte Young* as standing for the principle that "courts do not create exceptions to statutes every time it seems that the legislature overlooked something. The legislative role of the courts is more confined than that of the legislature." *See id.* at 484. Moreover, Professor David Currie explains that despite objections to *Seminole*, e.g., Vicki C. Jackson, *Seminole Tribe, The Eleventh Amendment, and the Potential Evisceration of Ex Parte Young*, 72 N.Y.U. L. Rev. 495 (1997), there is "nothing startling" about a conclusion that a statute providing a remedy for a violation of federal law impliedly precludes other forms of relief. *See* David P. Currie, *Ex Parte Young after Seminole Tribe*, 72 N.Y.U. L. Rev. 547, 548 (1997).

Therefore, applying *Seminole* entails an inquiry into two matters. First, the court must ascertain whether Congress created a remedy for the federal statutory rights it created. Second, it must determine whether the congressional remedy contemplates a suit against a state official. (It is possible that Congress will implicitly authorize a suit under *Ex Parte Young* by imposing specific duties on a state official. See *Seminole*, 517 U.S. at 75 n. 17.) *Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997), is an example of such an inquisition. Four infants with disabilities brought suit against the state of Illinois's governor and superintendent of education seeking relief under the Individuals with Disabilities Education Act. The plaintiffs alleged that these

state officials had failed to provide them with services guaranteed under the federal statute. The district court determined that jurisdiction over the state officials existed pursuant to *Ex Parte Young*, and, after finding the officials in violation of the act, entered an injunction requiring compliance with the act. On appeal, armed with *Seminole*, the state officials argued that because the act contained a remedial scheme, the district court erred in applying *Ex Parte Young*.

The court of appeals found that *Seminole* did not bar the district court's exercise of jurisdiction under the doctrine, for two reasons. One, the Individuals with Disabilities Education Act imposed duties on individual state officers, unlike the Indian Gaming Regulatory Act, which imposed duties on "the State." *See Marie O.*, 131 F.3d at 616-17. Thus, it was consistent with the remedial scheme contemplated by Congress to compel the defendant *state officials* to fulfill their duties under the act, analogously to *Ex Parte Young*. Two, the Individuals with Disabilities Education Act gave district courts discretion to "'grant such relief as it determines is appropriate,'" unlike the remedial scheme of the Indian Gaming Regulatory Act, which prescribed a more limited federal judicial remedy. *See Marie O.*, 131 F.3d at 616 (*quoting* 20 U.S.C. § 1480). Thus, exposing the defendant state officials to the full remedial powers of a federal court was in line with congressional intent. *See Seminole*, 517 U.S. at 75.

Returning to the Telecommunications Act, the district courts that have found *Ex Parte Young* applicable in the context of the Telecommunications Act have distinguished *Seminole* by focusing on the Court's use of the word "detailed." *See id.* at 74 ("where Congress has prescribed a *detailed* remedial scheme") (emphasis added). An example is *MCI Telecommunications v. Illinois Bell Telephone Co.*, 1998 U.S. Dist. LEXIS 4458, No. 97 C 2225,

1998 WL 156678 (N.D. Ill. Mar. 31, 1998), in which the court concluded,

> In contrast to the IGRA, the Telecommunications Act does not incorporate a "detailed remedial scheme" that would limit the type of remedies that a district court could prescribe in such a case. In fact, the only direction that the Act gives the court is that the court shall "determine whether the agreement or statement meets the requirements of section 251."

Id., 1998 WL 156678 at *11. This view of the Telecommunications Act is not unanimous, however. In *MCI Telecommunications Corp. v. Frisby*, 998 F. Supp. 625 (D. Md. 1998), the district court held that Congress provided an adequate remedy to vindicate a state commission's violation of §§ 251 and 252: a right to have the ruling reviewed in federal court. *See id.* at 630.

It is true that the congressionally created remedy in the Telecommunications Act is much less "detailed" than the remedy in the Indian Gaming Regulatory Act. But it is improper simply to compare the remedies of the Indian Gaming Regulatory Act and the remedies of the federal scheme at issue to see which is more detailed. Such an analysis reads *Seminole* too literally. *Seminole* holds that Congress's choice of a remedy must be respected and a "simple" remedy may be all that is necessary to secure federal rights.

Pursuant to *Seminole*, I agree with defendants that the doctrine of *Ex Parte Young* is inapplicable. Under the Telecommunications Act, state commissions oversee and supervise interconnection agreements in several ways. They may help set the terms of the agreement by either participating in meditations or arbitrations, *see* §§ 252(a), (b), or in reviewing statements of generally available terms and

conditions that will govern future agreements. *See* § 252(f). Also, state commissions act in an adjudicatory capacity, reviewing final agreements to ensure that they are in compliance with the requirements of the Act. *See* § 252(e)(1). Finally, state commissions serve a police function, enforcing noncompliance with interconnections agreements. *See Iowa Utilities Board*, 120 F.3d at 804. According to plaintiffs, to ensure that state commissions conduct these activities in compliance with the federal telecommunications law, a federal court must be able to assert jurisdiction over the individual state commissioners and order prospective injunctive relief requiring compliance with federal law. I disagree. Although state commissions' activities are diverse, they all hinge on a written ruling. (Indeed, in all these four cases, defendant commission's written rulings are being challenged.) Congress made a logical choice when it decided to limit the remedy within the Telecommunications Act to having a commission's ruling tested in federal court. Such limited review is adequate to cure errors in federal law without subjecting state commissioners to the full remedial powers of a federal district court. Limited review keeps the number of litigants to a minimum, which conserves judicial resources. Under *Seminole*, 517 U.S. at 74, because the remedy Congress chose secures federal rights adequately, this court lacks jurisdiction to proceed independently pursuant to *Ex Parte Young*.

Unfortunately for plaintiffs, the remedy Congress designed is ineffectual because defendant commission is an arm of the state of Wisconsin and is entitled to Eleventh Amendment immunity. That Congress chose an unconstitutional remedy does not change the result in these cases. Under *Seminole*, this court is also prevented from "rewriting the statutory scheme in order to approximate what [I] think Congress might have wanted." *See Seminole*, 517 U.S. at 76.

II. MOTION TO DISMISS

Although I conclude that defendant commission is entitled to Eleventh Amendment immunity and that jurisdiction is lacking to proceed in this matter against defendant commission members pursuant to *Ex Parte Young*, the effect of these conclusions on this case has not been addressed thoroughly by the parties. It is inappropriate to rule on defendants' motion to dismiss until the following issues are resolved.

In *Wisconsin Dept. of Corrections v. Schacht*, 524 U.S. 381, 141 L. Ed. 2d 364, 118 S. Ct. 2047 (1998), the Supreme Court held:

> A state's proper assertion of an Eleventh Amendment bar after removal means that the federal court cannot hear the barred claim. But that circumstance does not destroy removal jurisdiction over the remaining claims in the case before us. A federal court can proceed to hear those other claims

118 S. Ct. at 2054. Under Schacht it appears that defendants' entitlement to Eleventh Amendment immunity does not divest this court of subject matter jurisdiction. Although defendants are entitled to be dismissed from the proceedings, Schacht suggests that the underlying disputes concerning whether the interconnection agreements are in violation of federal law may proceed among the parties to the various agreements. (Some of the plaintiffs argue that this court has subject matter pursuant to § 252(e)(6), but it is uncertain whether they are arguing that this section permits these actions to move forward in a manner consistent with Schacht. See Pls. Br. in Opp'n to Mot. to Dismiss, Case No. 98-C-0366-C, dkt. # 57, at 13.) Also, some of the cases involve supplemental state law claims. It is conceivable that

the dismissal of defendants will not affect the court's jurisdiction to entertain them, although the parties may have to be realigned.

However, before proceeding in this fashion, it is necessary to determine whether the commission is an indispensable party to these cases. If it is, the cases may have to be dismissed in their entirety pursuant to Fed. R. Civ. P. 19(b).

Last, defendants suggest that the proper resolution of these cases is for them to be remanded for judicial review in state court. Although this remedy is plainly contrary to § 252(e)(4), which preempts state court judicial review, defendants note that some of the plaintiffs have filed actions in state court.

The parties will be required to address these issues in supplemental briefing. A status conference will be held on Thursday, December 3, 1998 at 10:30 a.m. before United States Magistrate Judge Stephen Crocker for the purpose of setting a briefing schedule. The parties will be required to appear in person. Telephone appearances are impractical because of the number of parties involved. A decision on defendants' motions to dismiss will be stayed pending completion of supplemental briefing.

ORDER

IT IS ORDERED that a status conference will be held in these actions on Thursday, December 3, 1998, at 10:30 a.m. before United States Magistrate Judge Stephen Crocker in Courtroom 250, at the Robert W. Kastenmeier Courthouse, Madison, Wisconsin.

Entered this 25th day of November, 1998.

BY THE COURT:

BARBARA B. CRABB

District Judge

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WISCONSIN

97-C-566-C

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and CHERYL L. PARRINO, DANIEL J. EASTMAN, and JOSEPH P. METTNER,

Defendants.

98-C-11-C

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN,

Plaintiff,

v.

PUBLIC SERVICE COMMISSION OF WISCONSIN, and CHERYL L. PARRINO, DANIEL J. EASTMAN, and JOSEPH P. METTNER, in their official capacities as members of the Commission, and MCI TELECOMMUNICATIONS CORP. and MCI METRO ACCESS TRANSMISSION SERVICES, INC.,

Defendants,

UNITED STATES OF AMERICA,
Intervenor.

98-C-153-C

MCI TELECOMMUNICATIONS CORP., and MCI METRO ACCESS TRANSMISSION SERVICES, INC.,
Plaintiffs,

v.

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, and CHERYL L. PARRINO, DANIEL J. EASTMAN, and JOSEPH P. METTNER, in their official capacities as members of the Commission,
Defendants,

UNITED STATES OF AMERICA,
Intervenor.

98-C-366-C

WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN,
Plaintiff,

v.

TCG MILWAUKEE, INC., PUBLIC SERVICE COMMISSION OF WISCONSIN, CHERYL L. PARRINO and JOSEPH P. METTNER, Commissioners of the Public

Service Commission of Wisconsin, and TIME WARNER COMMUNICATIONS OF MILWAUKEE, L.P.,

Defendants,

July 12, 1999, Decided
July 12, 1999, Filed

Before BARBARA B. CRABB, *District Judge.*

CRABB, *District Judge.*

The Telecommunications Act of 1996 introduced local telephony to a brave new world of competition. At the same time, it brought the Federal Communications Commission, all the state utility commissions and the federal courts into a new universe of "cooperative federalism." *See* Philip J. Weiser, *Chevron, Cooperative Federalism, and Telecommunications Reform*, 52 Vand. L. Rev. I, 53-54 (1999). The Supreme Court has remarked that the act's interplay of state and federal authority is "surpassing strange" and that the Congressional "scheme" is decidedly novel," as are "the attendant legal questions, such as whether federal courts must defer to state agency interpretations." *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721, 730 n.6, 733 n.10 (1999). The cases before the court bear out these comments.

All four of the cases before the court are brought under the 1996 act. Two have been consolidated pursuant to Fed. R. Civ. P. 41. All involve challenges to rulings of the Public Service Commission of Wisconsin dealing with the "interconnection" of local telephone carriers in Wisconsin. In all the lawsuits, the commission and its members are

defendants.[17] The local carriers are also parties, although they are aligned in various ways; some are plaintiffs (challenging a ruling), some are defendants (supporting a ruling) and one as both (supporting a ruling in one case, challenging rulings in others).

With legislation such as the 1996 act, which breaks so much substantive and procedural ground, it is no surprise that other courts and administrative agencies have issued rulings bearing on these lawsuits during the roughly eighteen months since these cases were filed. What is unsettling, particularly in light of the time and resources the parties and the court have devoted to the cases, is that a ruling by the Supreme Court made in the last three weeks has deprived this court of jurisdiction to entertain the cases.

In *College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board*, 144 L. Ed. 2d 605, 119 S. Ct. 2219, 1999 WL 412639 (U.S. 1999), the Supreme Court repudiated the doctrine of constructive waiver on which the Court of Appeals for the Seventh Circuit had rested its conclusion that a state commission was not entitled to Eleventh Amendment immunity from suits brought pursuant to the act. *See MCI Telecommunications Corp. v. Illinois Commerce Comm.*, 168 F.3d 315 (7th Cir. 1999), amended, 183 F.3d 558, 1999 U.S. App. LEXIS 13941, 1999 WL 447547 (1999). The holding in *College Savings Bank* requires defendants' dismissal from all the suits on the ground of immunity. This decision establishing defendants' immunity from suit is especially significant in light of the opinion of the Court of

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[17] The composition of defendant Public Service Commission has changed since these suits were filed, but defendants have not filed any motions for substitution of parties pursuant to Fed. R. Civ. P. 25(d)(1). Because the cases will be dismissed for lack of subject matter jurisdiction and because failure to make a formal motion for substitution does not affect the rights of the parties, see id., there is no need to change the captions of the cases.

Appeals for the Seventh Circuit in *Illinois Bell Telephone Co. v. Worldcom Technologies, Inc.*, 179 F.3d 566, 1999 U.S. App. LEXIS 13668, 1999 WL 436474 (7th Cir. 1999). If, after the decision in *MCI*, there had been any question about the need to include state commissions in any kind of federal court action brought under the act, it was answered in *Illinois Bell*. The court confirmed that the presence of a state commission is essential to federal jurisdiction under the Telecommunications Act. In the face of *College Savings Bank, MCI and Illinois Bell*, I have no option but to dismiss all four lawsuits.

OPINION

A. Eleventh Amendment

The possibility that the Eleventh Amendment might bring an end to this litigation is not exactly a surprise. On November 27, 1998, over the carriers' united objections, I held that defendants were entitled to Eleventh Amendment immunity. *See Wisconsin Bell, Inc. v. Public Service Comm. of Wisconsin*, 27 F. Supp. 2d 1149 (W.D. Wis. 1998). In arguing that Wisconsin was not immune to suit under the act, the carriers did not argue that Congress had abrogated the state's immunity or that the state had made an express waiver of its immunity. They relied solely on the concept of constructive waiver. In their view, defendants had chosen to regulate interconnection activities in Wisconsin and by doing so, had consented implicitly to being sued in federal court under the act's provision directing the federal courts to undertake the "review of state commission actions" for compliance with federal law. *See* 47 U.S.C. § 252(e)(6). In support of their assertion that defendants had a true choice not to engage in such cooperative federalism, the local carriers emphasized that Congress had directed the Federal Communications Commission to act whenever a state commission chose not to. *See* § 252(e)(4) (FCC to act if state commission fails to act).

Although I noted that it was arguable whether the doctrine of constructive waiver was still good law, *see Wisconsin Bell*, 27 F. Supp. 2d at 1158, I found the doctrine inapplicable in the circumstances of the Telecommunications Act. I agreed with defendants that their participation could not be viewed as a true waiver of Eleventh Amendment immunity given the nature of the legislation, which envisioned the state commissions' continuing to serve as regulators of local telephone carriers, and the long history of such local regulations, extending back at least to the passage of the Communications Act of 1934. Moreover, a careful reading of the act revealed that the FCC backup role was not complete. Under § 252(c)(4) and 47 C.F.R. § 51.801, if a state commission takes no action with respect to a voluntary agreement reached between carriers, the FCC does not review the agreement on behalf of the state commission. It is deemed approved automatically. *See Wisconsin Bell*, 27 F. Supp. 2d at 1155-59.

I rejected the local carriers' contention that *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908), yielded an alternative basis for jurisdiction. *Ex parte Young* established the rule (often referred to as a legal fiction) that injunctive relief is available to restrain state officials from violating the Constitution even when the state itself is immune from suit under the Eleventh Amendment. Although *Young* itself concerned an alleged constitutional violation, the rule extends to violations of federal statutory law. *See Idaho v. Coeur d' Alene Tribe of Idaho*, 521 U.S. 261, 281, 138 L. Ed. 2d 438, 117 S. Ct. 2028 (1997) ("An allegation of an on-going violation of *federal law* where the requested relief is prospective is ordinarily sufficient to invoke the *Young* fiction.") (Emphasis added.) *See also Marie O. v. Edgar*, 131 F.3d 610 (7th Cir. 1997) (*Ex parte Young* action can be brought to vindicate violations of federal statute). The theory of the local carriers was that defendants were

violating federal law because they had interpreted and applied the 1996 act improperly. (The United States, as intervenor, and the FCC, as amicus, joined the carriers in arguing that the commission and its members were not entitled to Eleventh Amendment immunity and alternatively, could be sued under *Ex parte Young*.)

At first glance, one must acknowledge the conceptual difference between a state official performing state functions in a way that violates federal law and a state official who is performing federally authorized functions but is alleged to have performed those functions improperly. One must acknowledge as well that some of the suits against state commissions brought under the act are directed at correcting the past decisions or other actions of the commission rather than at preventing future enforcement and that the actions at issue (interpretation and application of laws and regulations) involve the paradigmatic exercise of discretion. *Cf. Ex parte Young*, 209 U.S. at 158 ("There is no doubt that the court cannot control the exercise of the discretion of a [state] officer. It can only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action.") Finally, there is the oddity of a suit against the commission members in a situation in which some commissioners had dissented from the decision being reviewed in federal court. Would only the majority members be named defendants?

Even if the carriers' *Ex Parte Young* argument could have jumped these hurdles, it failed to overcome the obstacle of *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996), in which the Supreme Court held that when Congress creates a remedy within a legislative scheme, the federal courts may not use *Ex parte Young* as a basis for exercising jurisdiction over state officials who are alleged to have violated the substantive provisions of the legislation. Applying *Seminole Tribe*, I

concluded that *Ex parte Young* provided no basis for jurisdiction under the 1996 act because Congress had included a remedy for allegedly unlawful actions by a state commission: judicial review of state commission actions under § 252(e)(6). Just as in *Seminole*, it was irrelevant to the application of *Ex parte Young* that the congressional remedy was invalid because it violated the Eleventh Amendment. What was relevant was that Congress had specified a particular remedy for violations of the act. *See Wisconsin Bell*, 27 F. Supp. 2d at 1161 (*citing Seminole*, 517 U.S. at 76).

Although I declined to apply the constructive waiver doctrine or to use *Ex parte Young* as a mechanism for exercising federal jurisdiction, I delayed enforcement of the ruling because defendants had not made clear whether the ruling required dismissal of all the lawsuits. The parties had not developed the assertion that defendants were indispensable to the continuation of the litigation, warranting dismissal of all the cases pursuant to Fed. R. Civ. P. 19(b). Indeed, in at least two of the lawsuits (98-C-366-C and consolidated cases 98-C-11-C and 98-C-153-C), a controversy remained even in defendants' absence because the competing local carriers were aligned on opposite sides of the commission's ruling.

While the parties were briefing the question whether these cases might move forward in some fashion, the court of appeals decided *MCI*, 168 F.3d 315. The court held that the Illinois Commerce Commission was not entitled to Eleventh Amendment immunity when sued under the 1996 act, because the state had waived its immunity constructively when it chose to participate in the act's mandate of cooperative federalism. *See id.* at 322-32. Having reached this conclusion, the court of appeals declined expressly to decide whether *Ex parte Young* would serve as an independent ground for proceeding. *See id.* at 323 n.3.

At a February 18, 1999 scheduling conference that followed the issuance of the *MCI* opinion, I directed the parties to submit additional briefs in which they would both discuss the effects of the court of appeals' decision on this court's November 27 opinion and order and update their arguments on the merits, taking into account new administrative and judicial precedent, including *Iowa Utilities Board*, 525 U.S. 366, 142 L. Ed. 2d 834, 119 S. Ct. 721. Also, I granted defendants' request to amend their pleadings to raise a defense based on the Tenth Amendment.

From this additional briefing, and from a closer review of the act, it became apparent that oral argument was necessary to address defendants' various arguments that this court lacked subject matter jurisdiction, a topic that had received no attention previously in light of the ruling that defendants were immune. For instance, it was not clear whether it is a jurisdictional prerequisite that a state commission have made an explicit "determination" in a dispute. A related question was whether a party to an interconnection agreement must exhaust the dispute resolution mechanisms outlined in the agreement before bringing an action in federal court. Oral argument was scheduled for June 24, 1999, which by happenstance was the first day following the conclusion of the Supreme Court's 1998-1999 term.

On its last day, the Supreme Court decided *College Savings Bank*, 1999 WL 412639. The Court held that the "constructive-waiver experiment was ill conceived" and it overruled "whatever may remain" of *Parden v. Terminal Ry. Co*, 377 U.S. 184, 12 L. Ed. 2d 233, 84 S. Ct. 1207 (1964), the doctrine's seminal decision. *See Erwin Chemerinsky, Federal Jurisdiction*, § 7.6 at 434 (3d ed. 1999) (*Parden* is height of constructive consent).

In light of the Supreme Court's rejection of the constructive waiver doctrine, I am persuaded that the court

of appeals' prior decision in *MCI* is not controlling on defendants' entitlement to Eleventh Amendment immunity. Technically speaking, *MCI* is still on the books, although the court of appeals has vacated its prior order denying rehearing and directed the parties to file supplemental briefs addressing the effects of *College Savings Bank*. *See MCI Telecommunications Corp. v. Illinois Commerce Comm.*, 183 F.3d 567, 1999 U.S. App. LEXIS 14213, unpublished order (7th Cir. 1999). Moreover, in this circuit, district courts have stated that they are not bound by a court of appeals' decision that has been undermined by a subsequent decision of the Supreme Court. *See Villasenor v. Industrial Wire & Cable*, Inc., 929 F. Supp. 310, 313 (N.D. Ill. 1996). Although research does not reveal a similar statement by the court of appeals, two rulings in *Cameo Convalescent Center, Inc. v. Percy*, 738 F.2d 836 (1984) (*Cameo I*), and 800 F.2d 108 (1986) (*Cameo II*), imply that the court of appeals and the district courts are equally obliged to follow the most recent Supreme Court precedent. In *Cameo I*, 738 F.2d at 847, the court of appeals reversed the district court and remanded for retrial on various grounds. On remand, however, the district court set aside the mandate and dismissed the case in its entirety on the basis of a Supreme Court decision that was released one day after *Cameo* was decided. In *Cameo II*, the losing party contended that the district court could not dismiss the case because it was bound by either the court of appeals' prior mandate or the law of the case doctrine to retry the matter. The court of appeals rejected such claims, reasoning that the district court properly applied the Supreme Court's "intervening change in the controlling authority." *See Cameo II*, 800 F.2d at 110.

At oral argument in these cases, some of the local carriers and the United States requested the opportunity to brief the effects of *College Savings Bank*. Some suggested that College Savings Bank was not a complete renunciation of

the constructive waiver doctrine and that cases brought against state commissions under the 1996 act might fit into what is left. Alternatively, two of the carriers predicted (correctly) that the court of appeals might reconsider *MCI*, making a stay appropriate. I am not convinced that either briefing or a stay is warranted.

It is true that in *College Savings Bank*, the Court acknowledged that some apparent constructive waivers are still viable in a limited context. For example, in exchange for federal legislation, such as approval of an interstate compact or the receipt of some gift, Congress can require a state to do something it could not otherwise compel it to do outright. *See College Savings Bank*, 1999 WL 412639, at *12. However, the 1996 act is neither an interstate compact nor an act involving a gift of funds. There is no arguable basis to a claim that equates a gift with a state's participation in the act's cooperative federalism (supervising the regulation of local telephone carriers in the state). The example the Court gave of Congress's ability to leverage its gift giving is *South Dakota v. Dole*, 483 U.S. 203, 97 L. Ed. 2d 171, 107 S. Ct. 2793 (1987), in which Congress conditioned the states' receipt of a portion of federal highway dollars upon raising the drinking age to 21. *See College Savings Bank*, 1999 WL 412369, at *12. With respect to the 1996 act, the constructive waiver argument would be that Congress gave the states the "gift" of being able to participate in the interconnection process. *See MCI*, 168 F.3d at 322 ("The states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court.") But a state's continuing to regulate local telephone carriers is hardly the acceptance of a "gift" in the same way that accepting highway funding is characterized in *College Savings Bank*. A state's continued regulation of local enterprise (local telephone carriers) is an "otherwise permissible activity" that can yield no inference as to a state's motivation for doing it. *See College Savings Bank, id.* at *12; *see also id.* at *10 (constructive consent is not

a doctrine associated with waiver of constitutional rights). Indeed, it is debatable whether highway funds are a true gift that can be refused readily and without consequence. *Cf. id.* at *18 ("Given the amount of money at stake, it may be harder, not easier for a State to refuse highway funds than to refrain from entering the investment services business.")(Breyer, J., dissenting).

As the preceding analysis reveals, *College Savings Bank* is a time machine, transporting this lawsuit back to November 27, 1998, when I held that defendants were entitled to Eleventh Amendment immunity and that *Ex parte Young* did not provide an alternative ground for exercising jurisdiction. I see no reason to depart from the substance of that ruling.

However, a minor change in the November 27 opinion and order is necessary. In discussing the need for a clear signal warning of the potential of a suit in federal court as an element of the now dead constructive waiver doctrine, I misread § 252(e)(6). The statute provides:

> **(6) Review of State commission actions**
>
> In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section.

In reaching the conclusion that the statute provided such a signal, I reasoned that the first sentence of this statute "makes it clear that state commissions might be sued: it says that there will be "judicial review of the *Commission's* actions." *Wisconsin Bell*, 27 F. Supp. 2d at 1156. Defendants are correct that the first sentence, which uses the word "commission" with a capital "C," is directed toward the Federal Communications Commission. Only the second sentence, which uses the phrase "State commission," may be considered in the analysis.

On reconsideration, however, I see no reason to change the conclusion that § 252(e)(6) provides a clear warning to state commissions. By itself, the second sentence informs a state commission of two critical pieces of information: persons "aggrieved" by *its* decisions can bring suit and these suits will be heard in "Federal district court."

B. Subject Matter Jurisdiction

At oral argument, I asked the parties to address the question whether these cases could continue without the commission as a party. In my view, a reasonable argument could be made that in the absence of the state commission, a federal court could still entertain a challenge to a commission's *ruling* so long as one local carrier was participating on each side of the ruling (that is, there is an Article III controversy); two, the only decision for the federal court is whether the ruling conforms to federal law; and three, the outcome and remedy would not prejudice the state commission. Under Rule 19(b), the potential of prejudice to an absent party supports a determination that the absent party is indispensable and that the lawsuit must be dismissed. In cases brought under § 252(e)(6), such prejudice might inure to an immune and absent state commission if the judicial remedy was a remand to the state commission to conduct further proceedings.

However, I am convinced that this argument cannot be sustained in light of the court of appeals' decisions in *MCI*, 168 F.3d 315, and *Illinois Bell*, 1999 WL 436474, Under these cases, one cannot claim that the necessity of a state commission is a matter of discretion under Rule 19. The cases hold that the presence of the commission is a jurisdictional prerequisite.

MCI involved a dispute over certain interconnection agreements that the Illinois Commerce Commission had arbitrated and approved. *Illinois Bell* involved a dispute between an incumbent local carrier (Illinois Bell) and several competing carriers with which the incumbent had entered into interconnection agreements. The incumbent argued that because calls made to Internet service providers are long distance (interstate) calls, it was not required to pay the other carriers "reciprocal compensation" for those calls. (Under § 252(b)(5), interconnecting carriers are required to make arrangements to compensate each other for the costs of carrying the *local* calls that their respective customers make to each other.) When the incumbent stopped paying, the competing carriers filed complaints with the Illinois Commerce Commission, which determined that the incumbent was required to pay compensation for Internet calls and ordered it to continue doing so.

In *MCI*, the parties to the disputed agreement brought suit against the commission. In *Illinois Bell*, the incumbent carrier brought suit against the individual commissioners and the other local carriers. Both cases were brought in federal court pursuant to § 252(e)(6); in both cases, the plaintiffs contended that the state commission's order violated the 1996 act. *See MCI*, 168 F.3d at 318; *Illinois Bell*, 1999 WL 436474, at *1-3.

Before taking up the question of Eleventh Amendment immunity in *MCI*, the court of appeals

addressed the carriers' argument that the court need not reach the question of immunity "because the Telecommunications Act does not even provide for suits against states in federal court, but instead provides only for federal court review of the interconnection agreements themselves." *MCI*, 168 F.3d at 320. The court rejected this argument on the grounds that the statute does not permit such a construction when it is read as a whole. In addition, the court noted that the title of the subsection providing for judicial review (§ 252(e)(6) is titled "Review of state commission actions," not "Review of interconnection agreements, "signaling that Congress intended that the state commissions be parties to the federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions." *Id.*

In *Illinois Bell*, 1999 WL 436474, it was the commissioners who raised the threshold argument that subject matter jurisdiction was lacking under § 252(e)(6). Noting that the judicial review provision does not include the word "order," the commissioners argued that federal jurisdiction was limited to the review of final agreements and did not extend to orders of a commission arising out of such agreements. *See id.* at *3. The court of appeals rejected the commissioners' argument for essentially the same reasons it had articulated in *MCI*. First, it noted that the title of the provision uses the term "state commission actions." Second, the court relied on another provision, § 252(e)(4), which bars *state courts* from reviewing the "action" of a state commission in approving or rejecting an agreement. The court reasoned that a comparison of § 252(e)(6) and § 252(e)(4) reveals a congressional intention to permit competing carriers to bring lawsuits "reviewing 'actions' by state commissions and that those suits were to be brought exclusively in the federal courts." *See id.*, at *4. Finally, *quoting MCI*, 168 F.3d at 320, it added that Congress had intended that the "'state commissions be parties to the

federal court suits reviewing their actions, just as the FCC is a party to suits seeking review of its actions.'" *Id.*

Finally, before closing the jurisdictional discussion, the court of appeals noted the plaintiff's failure to make the commission a party to the suit. It saw this as only a technical problem because the defendant commissioners were named in their official capacities and they acknowledged that they were "the Commission." Accordingly, the court concluded, "We have jurisdiction under § 252(e)(6) to review the action of the Commission and will proceed on that basis." *Id.*, 1999 WL 436474, at *4.

Were it not for *MCI* and *Illinois Bell*, one could plausibly argue, as I have noted, that the presence of the state commission was not a jurisdictional prerequisite and that in the absence of a state commission a federal court could still entertain a lawsuit to determine whether a commission's ruling complied with the act, so long as there were two opposing carriers to insure an Article III controversy and the commission was not indispensable under Rule 19, a matter that would be decided on a case by case basis. Indeed, taking the argument further, portions of § 252(e) support an argument that Congress did not envision that state commissions would be parties to suits under § 252(e)(6) in the same way that the FCC is a party to proceedings reviewing its actions. *Compare Illinois Bell*, 1999 WL 436474, at *4. Perhaps Congress envisioned the review of state commission actions to be similar to garden variety appeals from trial courts to appellate courts or to actions for judicial review of private arbitrations. In this type of proceeding, the first line decision makers are not thought as necessary to the proceedings in which their rulings are reviewed. The second sentence of § 252(e)(6) supports such an interpretation when read by itself: it provides that the district court is to "determine whether the *agreement* or statement *meets* the requirements of [the act]." (Emphasis added.) Support for this view may be found in § 252(e)(1),

which requires state commissions to make written findings identifying any deficiencies they find in interconnection agreements. Thus, practically speaking, it is not immediately clear that the state commission must be parties to § 252(e)(6) proceedings in order to make their views known.

Nonetheless, *MCI* and *Illinois Bell* hold that the presence of the state commission is required for jurisdiction. According to these cases, all actions brought pursuant to § 252(e)(6) are defective in the absence of the state commission. The court does not explain why this is so, but this is the only conclusion that can be drawn from the decisions, especially in light of *Illinois Bell*, in which the court added the Illinois Commerce Commission in order to "perfect" the existence of jurisdiction. *See Illinois Bell*, 1999 WL 436474, at *4. Because defendants are entitled to immunity, they will no longer be parties to these actions. In their absence, these lawsuits must be dismissed.

One more issue deserves attention. In their pleadings, some of the local carriers contend that alternative bases for jurisdiction may be found in 28 U.S.C. § 1331 (general federal question), § 1337 (general federal commerce) and the declaratory judgment statutes, §§ 2201-02. Other courts have rejected summarily the claim that these statutes create jurisdiction over and beyond § 252(e). In *Indiana Bell Telephone Co., Inc. v. McCarty*, 30 F. Supp. 2d 1100 (S.D. Ind. 1998), the district court explained that where Congress provides a means to seek review of an agency determination, alternative means of review are inapplicable. *See id.* at 1103 n.2 (*citing Southwestern Bell Telephone Co. v. McKee*, 1997 U.S. Dist. LEXIS 11874, No. Civ. A. 97-2197-EEO, 1997 WL 450041, *4 (D. Kan. July 15, 1997)). The decisions of these courts are persuasive. Indeed, a conclusion that such general jurisdiction exists would be contrary to *Seminole Tribe*, 517 U.S. 44, 134 L. Ed. 2d 252, 116 S. Ct. 1114, which stands for the proposition that Congress's

particular choices of remedy must be respected. Respect for congressional intent means that generalized statutes cannot be used in place of the tailored ones Congress has created. *See Wisconsin Bell*, 27 F. Supp. 2d at 1159-60.

ORDER

IT IS ORDERED that:

1. Defendants Public Service Commission of Wisconsin and its members, Cheryl L. Parrino, Daniel J. Eastman and Joseph P. Mettner, are entitled to Eleventh Amendment immunity in 97-C-566-C, 98-C-11-C, 98-C-153-C and 98-C-366-C; these cases are DISMISSED as to these defendants;

2. Subject matter jurisdiction is lacking in 97-C-566-C, 98-C-11-C, 98-C-153-C and 98-C-366-C; these cases are DISMISSED in full without prejudice;

3. The clerk of court is directed to enter judgment dismissing 97-C-566-C, 98-C-11-C, 98-C-153-C and 98-C-366-C for lack of subject matter jurisdiction and close the cases.

Entered this 12th day of July 1999.

BY THE COURT:

BARBARA B. CRABB

District Judge

APPENDIX D

STATUTORY PROVISIONS INVOLVED

FROM THE CONSTITUTION OF THE UNITED STATES OF AMERICA

Article III, Section 2, Clause 1.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States,--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Amendment X.

The powers not delegated to the United States by th Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

FROM TITLE 47. TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5. WIRE OR RADIO COMMUNICATION
GENERAL PROVISIONS

§ 251. Interconnection

(a) General duty of telecommunications carriers. Each telecommunications carrier has the duty--

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

(b) Obligations of all local exchange carriers. Each local exchange carrier has the following duties:

(1) Resale. The duty not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services.

(2) Number portability. The duty to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission.

(3) Dialing parity. The duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays.

(4) Access to rights-of-way. The duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on

rates, terms, and conditions that are consistent with section 224.

(5) Reciprocal compensation. The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

(c) Additional obligations of incumbent local exchange carriers. In addition to the duties contained in subsection (b), each incumbent local exchange carrier has the following duties:

(1) Duty to negotiate. The duty to negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements to fulfill the duties described in paragraphs (1) through (5) of subsection (b) and this subsection. The requesting telecommunications carrier also has the duty to negotiate in good faith the terms and conditions of such agreements.

(2) Interconnection. The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network—

(A) for the transmission and routing of telephone exchange service and exchange access;

(B) at any technically feasible point within the carrier's network;

(C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the

terms and conditions of the agreement and the requirements of this section and section 252.

(3) Unbundled access. The duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service.

(4) Resale. The duty--

(A) to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers; and

(B) not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service, except that a State commission may, consistent with regulations prescribed by the Commission under this section, prohibit a reseller that obtains at wholesale rates a telecommunications service that is available at retail only to a category of subscribers from offering such service to a different category of subscribers.

(5) Notice of changes. The duty to provide reasonable public notice of changes in the information necessary for the transmission and routing of services using that local exchange carrier's facilities or networks, as well as of any other changes that would affect the interoperability of those facilities and networks.

(6) Collocation. The duty to provide, on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, for physical collocation of equipment necessary for interconnection or access to unbundled network elements at the premises of the local exchange carrier, except that the carrier may provide for virtual collocation if the local exchange carrier demonstrates to the State commission that physical collocation is not practical for technical reasons or because of space limitations.

(d) Implementation.

(1) In general. Within 6 months after the date of enactment of the Telecommunications Act of 1996, the Commission shall complete all actions necessary to establish regulations to implement the requirements of this section.

(2) Access standards. In determining what network elements should be made available for purposes of subsection (c)(3), the Commission shall consider, at a minimum, whether--

(A) access to such network elements as are proprietary in nature is necessary; and

(B) the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer.

(3) Preservation of State access regulations. In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that—

(A) establishes access and interconnection obligations of local exchange carriers;

(B) is consistent with the requirements of this section; and

(C) does not substantially prevent implementation of the requirements of this section and the purposes of this part.

(e) Numbering administration.

(1) Commission authority and jurisdiction. The Commission shall create or designate one or more impartial entities to administer telecommunications numbering and to make such numbers available on an equitable basis. The Commission shall have exclusive jurisdiction over those portions of the North American Numbering Plan that pertain to the United States. Nothing in this paragraph shall preclude the Commission from delegating to State commissions or other entities all or any portion of such jurisdiction.

(2) Costs. The cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission.

(3) Universal emergency telephone number. The Commission and any agency or entity to which the Commission has delegated authority under this subsection shall designate 9-1-1 as the universal emergency telephone number within the United States for reporting an emergency to appropriate authorities and requesting assistance. The designation shall apply to both wireline and wireless telephone service. In making the designation, the Commission (and any such agency or entity) shall provide appropriate transition periods for areas in which 9-1-1 is not in use as an emergency telephone number on the date of

enactment of the Wireless Communications and Public Safety Act of 1999.

(f) Exemptions, suspensions, and modifications.

(1) Exemption for certain rural telephone companies.

(A) Exemption. Subsection (c) of this section shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof).

(B) State termination of exemption and implementation schedule. The party making a bona fide request of a rural telephone company for interconnection, services, or network elements shall submit a notice of its request to the State commission. The State commission shall conduct an inquiry for the purpose of determining whether to terminate the exemption under subparagraph (A). Within 120 days after the State commission receives notice of the request, the State commission shall terminate the exemption if the request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof). Upon termination of the exemption, a State commission shall establish an implementation schedule for compliance with the request that is consistent in time and manner with Commission regulations.

(C) Limitation on exemption. The exemption provided by this paragraph shall not apply with respect to a request under subsection (c) from a cable operator providing video programming, and seeking to provide any telecommunications service, in the area in which the rural

telephone company provides video programming. The limitation contained in this subparagraph shall not apply to a rural telephone company that is providing video programming on the date of enactment of the Telecommunications Act of 1996.

(2) Suspensions and modifications for rural carriers. A local exchange carrier with fewer than 2 percent of the Nation's subscriber lines installed in the aggregate nationwide may petition a State commission for a suspension or modification of the application of a requirement or requirements of subsection (b) or (c) to telephone exchange service facilities specified in such petition. The State commission shall grant such petition to the extent that, and for such duration as, the State commission determines that such suspension or modification--

(A) is necessary--

(i) to avoid a significant adverse economic impact on users of telecommunications services generally;

(ii) to avoid imposing a requirement that is unduly economically burdensome; or

(iii) to avoid imposing a requirement that is technically infeasible; and

(B) is consistent with the public interest, convenience, and necessity.

The State commission shall act upon any petition filed under this paragraph within 180 days after receiving such petition. Pending such action, the State commission may suspend enforcement of the requirement or requirements to which the petition applies with respect to the petitioning carrier or carriers.

(g) Continued enforcement of exchange access and interconnection requirements. On and after the date of enactment of the Telecommunications Act of 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding the date of enactment of the Telecommunications Act of 1996 under any court order, consent decree, or regulation, order, or policy of the Commission, until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission after such date of enactment. During the period beginning on such date of enactment and until such restrictions and obligations are so superseded, such restrictions and obligations shall be enforceable in the same manner as regulations of the Commission.

(h) Definition of incumbent local exchange carrier.

(1) Definition. For purposes of this section, the term "incumbent local exchange carrier" means, with respect to an area, the local exchange carrier that--

(A) on the date of enactment of the Telecommunications Act of 1996, provided telephone exchange service in such area; and

(B) (i) on such date of enactment, was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or

(ii) is a person or entity that, on or after such date of enactment, became a successor or assign of a member described in clause (i).

(2) Treatment of comparable carriers as incumbents. The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—

(A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by a carrier described in paragraph (1);

(B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

(i) Savings provision. Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

§ 252. Procedures for negotiation, arbitration, and approval of agreements

(a) Agreements arrived at through negotiation.

(1) Voluntary negotiations. Upon receiving a request for interconnection, services, or network elements pursuant to section 251, an incumbent local exchange carrier may negotiate and enter into a binding agreement with the requesting telecommunications carrier or carriers without

regard to the standards set forth in subsections (b) and (c) of section 251. The agreement shall include a detailed schedule of itemized charges for interconnection and each service or network element included in the agreement. The agreement, including any interconnection agreement negotiated before the date of enactment of the Telecommunications Act of 1996, shall be submitted to the State commission under subsection (e) of this section.

(2) Mediation. Any party negotiating an agreement under this section may, at any point in the negotiation, ask a State commission to participate in the negotiation and to mediate any differences arising in the course of the negotiation.

(b) Agreements arrived at through compulsory arbitration.

(1) Arbitration. During the period from the 135th to the 160th day (inclusive) after the date on which an incumbent local exchange carrier receives a request for negotiation under this section, the carrier or any other party to the negotiation may petition a State commission to arbitrate any open issues.

(2) Duty of petitioner.

(A) A party that petitions a State commission under paragraph (1) shall, at the same time as it submits the petition, provide the State commission all relevant documentation concerning--

(i) the unresolved issues;

(ii) the position of each of the parties with respect to those issues; and

(iii) any other issue discussed and resolved by the parties.

(B) A party petitioning a State commission under paragraph (1) shall provide a copy of the petition and any documentation to the other party or parties not later than the day on which the State commission receives the petition.

(3) Opportunity to respond. A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the State commission receives the petition.

(4) Action by State commission.

(A) The State commission shall limit its consideration of any petition under paragraph (1) (and any response thereto) to the issues set forth in the petition and in the response, if any, filed under paragraph (3).

(B) The State commission may require the petitioning party and the responding party to provide such information as may be necessary for the State commission to reach a decision on the unresolved issues. If any party refuses or fails unreasonably to respond on a timely basis to any reasonable request from the State commission, then the State commission may proceed on the basis of the best information available to it from whatever source derived.

(C) The State commission shall resolve each issue set forth in the petition and the response, if any, by imposing appropriate conditions as required to implement subsection (c) upon the parties to the agreement, and shall conclude the resolution of any unresolved issues not later than 9 months after the date on which the local exchange carrier received the request under this section.

(5) Refusal to negotiate. The refusal of any other party to the negotiation to participate further in the negotiations, to cooperate with the State commission in carrying out its

function as an arbitrator, or to continue to negotiate in good faith in the presence, or with the assistance, of the State commission shall be considered a failure to negotiate in good faith.

(c) Standards for arbitration. In resolving by arbitration under subsection (b) any open issues and imposing conditions upon the parties to the agreement, a State commission shall--

(1) ensure that such resolution and conditions meet the requirements of section 251 including the regulations prescribed by the Commission pursuant to section 251;

(2) establish any rates for interconnection, services, or network elements according to subsection (d); and

(3) provide a schedule for implementation of the terms and conditions by the parties to the agreement.

(d) Pricing standards.

(1) Interconnection and network element charges. Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section --

(A) shall be--

(i) based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element (whichever is applicable), and

(ii) nondiscriminatory, and

(B) may include a reasonable profit.

(2) Charges for transport and termination of traffic.

(A) In general. For the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless-

(i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

(B) Rules of construction. This paragraph shall not be construed--

(i) to preclude arrangements that afford the mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that waive mutual recovery (such as bill-and-keep arrangements); or

(ii) to authorize the Commission or any State commission to engage in any rate regulation proceeding to establish with particularity the additional costs of transporting or terminating calls, or to require carriers to maintain records with respect to the additional costs of such calls.

(3) Wholesale prices for telecommunications services. For the purposes of section 251(c)(4), a State commission shall determine wholesale rates on the basis of retail rates

charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

(e) Approval by State commission.

(1) Approval required. Any interconnection agreement adopted by negotiation or arbitration shall be submitted for approval to the State commission. A State commission to which an agreement is submitted shall approve or reject the agreement, with written findings as to any deficiencies.

(2) Grounds for rejection. The State commission may only reject--

(A) an agreement (or any portion thereof) adopted by negotiation under subsection (a) if it finds that--

(i) the agreement (or portion thereof) discriminates against a telecommunications carrier not a party to the agreement; or

(ii) the implementation of such agreement or portion is not consistent with the public interest, convenience, and necessity; or

(B) an agreement (or any portion thereof) adopted by arbitration under subsection (b) if it finds that the agreement does not meet the requirements of section 251, including the regulations prescribed by the Commission pursuant to section 251, or the standards set forth in subsection (d) of this section.

(3) Preservation of authority. Notwithstanding paragraph (2), but subject to section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of an

agreement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(4) Schedule for decision. If the State commission does not act to approve or reject the agreement within 90 days after submission by the parties of an agreement adopted by negotiation under subsection (a), or within 30 days after submission by the parties of an agreement adopted by arbitration under subsection (b), the agreement shall be deemed approved. No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section.

(5) Commission to act if State will not act. If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission.

(6) Review of State commission actions. In a case in which a State fails to act as described in paragraph (5), the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be the exclusive remedies for a State commission's failure to act. In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 and this section.

(f) Statements of generally available terms.

(1) In general. A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.

(2) State commission review. A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.

(3) Schedule for review. The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--

(A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or

(B) permit such statement to take effect.

(4) Authority to continue review. Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2).

(5) Duty to negotiate not affected. The submission or approval of a statement under this subsection shall not

relieve a Bell operating company of its duty to negotiate the terms and conditions of an agreement under section 251.

(g) Consolidation of State proceedings. Where not inconsistent with the requirements of this Act, a State commission may, to the extent practical, consolidate proceedings under sections 214(e), 251(f), 253, and this section in order to reduce administrative burdens on telecommunications carriers, other parties to the proceedings, and the State commission in carrying out its responsibilities under this Act.

(h) Filing required. A State commission shall make a copy of each agreement approved under subsection (e) and each statement approved under subsection (f) available for public inspection and copying within 10 days after the agreement or statement is approved. The State commission may charge a reasonable and nondiscriminatory fee to the parties to the agreement or to the party filing the statement to cover the costs of approving and filing such agreement or statement.

(i) Availability to other telecommunications carriers. A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.

(j) Definition of incumbent local exchange carrier. For purposes of this section, the term "incumbent local exchange carrier" has the meaning provided in section 251(h).

§ 601(c)(1), Uncodified Note to 47 USC § 152. Applicability of Consent Decrees and Other Law.

(c) Federal, State, and local law.

(1) No implied effect. This Act and the amendments made by this Act [for full classification, consult USCS Tables volumes] shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.

FROM THE CODE OF FEDERAL REGULATIONS
TITLE 47. TELECOMMUNICATION
CHAPTER I. FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B. COMMON CARRIER SERVICES
PART 51. INTERCONNECTION
SUBPART I. PROCEDURES FOR IMPLEMENTATION OF SECTION 252 OF THE ACT

§ 51.801 Commission action upon a state commission's failure to act to carry out its responsibility under section 252 of the Act.

(a) If a state commission fails to act to carry out its responsibility under section 252 of the Act in any proceeding or other matter under section 252 of the Act, the Commission shall issue an order preempting the state commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the state commission under section 252 of the Act with respect to the proceeding or matter and shall act for the state commission.

(b) For purposes of this part, a state commission fails to act if the state commission fails to respond, within a reasonable

time, to a request for mediation, as provided for in section 252(a)(2) of the Act, or for a request for arbitration, as provided for in section 252(b) of the Act, or fails to complete an arbitration within the time limits established in section 252(b)(4)(C) of the Act.

(c) A state shall not be deemed to have failed to act for purposes of section 252(e)(5) of the Act if an agreement is deemed approved under section 252(e)(4) of the Act.

§ 51.807(b) Arbitration and mediation of agreements by the Commission pursuant to section 252(e)(5) of the Act.

(b) When the Commission assumes responsibility for a proceeding or matter pursuant to section 252(e)(5) of the Act, it shall not be bound by state laws and standards that would have applied to the state commission in such proceeding or matter.

FROM WISCONSIN STATUTES (1997-98)
CHAPTER 196. REGULATION OF PUBLIC UTILITIES

§196.41. Court review.

Any order or determination of the commission may be reviewed under ch. 227.

FROM WISCONSIN STATUTES (1997-98)
CHAPTER 227. ADMINISTRATIVE PROCEDURE AND REVIEW
SUBCHAPTER III ADMINISTRATIVE ACTIONS AND JUDICIAL REVIEW

§227.52. Judicial review; decisions reviewable.

Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter, except as otherwise provided by law and except for the following:

(1) Decisions of the department of revenue other than decisions relating to alcohol beverage permits issued under ch. 125.

(2) Decisions of the department of employe trust funds.

(3) Those decisions of the division of banking that are subject to review, prior to any judicial review, by the banking review board.

(4) Decisions of the office of credit unions.

(5) Decisions of the division of savings institutions.

(6) Decisions of the chairperson of the elections board.

(7) Those decisions of the department of workforce development which are subject to review, prior to any judicial review, by the labor and industry review commission.

§227.53. Parties and proceedings for review.

(1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

§227.58 Appeals.

Any party, including the agency, may secure a review of the final judgment of the circuit court by appeal to the court of appeals within the time period specified in s. 808.04 (1).

Supreme Court, U.S.
FILED
DEC 20 2000
CLERK

(2) (2)

Nos. 00-653 and 00-744

IN THE

Supreme Court of the United States

PUBLIC SERVICE COMMISSION
OF WISCONSIN, *et al.*,
Petitioners,

v.

WISCONSIN BELL, INC., d/b/a
AMERITECH WISCONSIN, *et al.*,
Respondents.

ILLINOIS COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

MCI TELECOMMUNICATIONS CORPORATION, *et al.*,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF RESPONDENTS MCI WORLDCOM NETWORK SERVICES, INC., MCIMETRO ACCESS TRANSMISSION SERVICES, INC., TCG MILWAUKEE, INC., AND TIME WARNER TELECOM OF WISCONSIN, L.P.

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Rule 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent MCI WORLDCOM Network Services, Inc., and MCImetro Access Transmission Services, Inc., state as follows:

On May 7, 1999, MCI Telecommunications Corporation changed its name to MCI WORLDCOM Network Services, Inc. MCImetro Access Transmission Services, Inc. is a wholly owned subsidiary of MCI WORLDCOM Network Services, Inc. MCI WORLDCOM Network Services, inc., is a wholly owned subsidiary of MCI Communications Corporation which, in turn, is a wholly owned subsidiary of WorldCom, Inc. WorldCom, Inc., through its wholly owned subsidiaries, provides local and long-distance telecommunications services domestically and internationally.

WorldCom, Inc. is a publicly traded company on the Nasdaq National Market under the symbol "WCOM". No publicly held company owns 10 percent or more of WorldCom stock.

Pursuant to Rule 29.6, respondent TCG Milwaukee, Inc. states as follows:

TCG Milwaukee, Inc., is a wholly owned subsidiary of Teleport Communications Group Inc., which in turn is a wholly owned subsidiary of AT&T Corporation. No publicly held corporation owns 10% or more of AT&T Corporation's stock.

Pursuant to Rule 29.6, respondent Time Warner Communications of Milwaukee, L.P. states as follows:

Time Warner Communications of Milwaukee, L.P., now known as Time Warner Telecom of Wisconsin, L.P. is substantially owned by Time Warner Telecom, Inc. Time Warner Telecom, Inc. is an affiliate of Time Warner, Inc. Time

Warner, inc. is a publicly traded company on the New York Stock Exchange under the symbol "TWX".

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ADMINISTRATIVE RULINGS

In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (rel. June 14, 2000) 24

MISCELLANEOUS

Robert L. Stern, *et al.*, SUPREME COURT PRACTICE (7th ed.1993) 20

STATEMENT

Petitioners – the Public Service Commission of Wisconsin ("PSCW") and its individual commissioners in their official capacities and the Illinois Commerce Commission ("ICC") and its individual commissioners in their official capacities – ask the Court to determine whether the Eleventh Amendment bars federal courts from undertaking the review of state public utility commission actions that is expressly authorized by the Telecommunications Act of 1996[1] ("the Act" or "the 1996 Act"). Specifically, section 252(e)(6) of the Act provides that if state commissions agree to participate in the administration of a new federal scheme governing "interconnection" arrangements among competing local phone companies, their actions may be reviewed for compliance with the Act in federal district court. Petitioners did choose to participate, but then asserted an Eleventh Amendment defense to the ensuing federal lawsuits. The Seventh Circuit, in a ruling consistent with all comparable cases from other circuits, affirmed the rejection of the Eleventh Amendment immunity claim, relying both on waiver and on the doctrine of *Ex parte Young*, 209 U.S. 123 (1908).

1. Statutory Scheme

The 1996 Act fundamentally altered the balance between federal and state authority in one area of telecommunications regulation. Seeking to introduce competition to local telephone service, Congress partially supplanted the existing system of exclusive state regulation, imposing a new set of federal standards and

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[1] Codified at 47 U.S.C. § 151 *et seq.*

procedures governing "interconnection" between incumbent local companies and potential competitors. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 371-73 (1999).

In the Act, Congress preempted all state laws erecting barriers to entry into telecommunications markets. § 253(a). Then it created three specified routes for competitive entry into local telephone markets to speed the introduction of competition. First, the Act requires incumbent local carriers to "interconnect" their networks with those of new entrants, thereby enabling subscribers connected to different networks to call each other. § 251(c)(2). Second, the Act requires incumbents to lease elements of their networks to new entrants on an unbundled basis. § 251(c)(3). Third, the Act requires incumbents to sell new entrants complete services on a wholesale basis for resale to retail customers. § 251(c)(4). In each case, Congress prescribed specific federal standards governing the rates that the respective carriers charge each other for these services. §§ 251(c)(2)-(4), 252(d); *AT&T Corp.*, 525 U.S. at 371-73. Congress vested the Federal Communications Commission ("FCC") with the authority to make general rules and regulations to implement the substantive federal standards created by the Act. 525 U.S. at 377-84 & n.5; § 201(b).

In the spirit of cooperative federalism, Congress also carved out a new, voluntary role for states. The Act requires incumbent local carriers to negotiate with new entrants to develop "interconnection agreements" specifying the terms of interconnection, access to network elements, and resale. § 251(c)(1). If the parties cannot arrive at a complete interconnection agreement through negotiation, however, the Act gives state utility

commissions the authority (if they choose to exercise it) to convene compulsory "arbitrations" at the request of a party to set terms by applying the substantive provisions of the Act and the FCC's regulations. § 252(b), (c). Whether negotiated or arbitrated, the final interconnection agreement must be submitted for review to determine whether it complies with the Act – with the state commissions reviewing the agreement if they choose to do so. § 252(e)(1).

The Act also provides that the local incumbent carrier may "prepare and file with a State commission a statement of the terms and conditions" that the incumbent "generally offers" to new entrants in the state. § 252(f)(1). In order to be approved by the state commission, these "Statements of Generally Available Terms" ("SGATs") must also be reviewed to ensure compliance with the Act. § 252(f)(2). Significantly, the submission or approval of an SGAT does "not relieve" a local incumbent carrier of "its duty to negotiate the terms and conditions" of interconnection pursuant to § 251. § 252(f)(5).

The Act does not require state commissions to implement the new federal scheme. If a state commission declines to exercise the authority offered to it by the Act, the FCC will assume those duties. § 252(e)(5). Whether carried out by the FCC or a state commission, however, final agency determinations regarding the terms of an interconnection agreement are subject to review in federal court for compliance with the Act. If a state commission elects to participate in the Act's implementation, "any party aggrieved . . . may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section[s] 251" and § 252(e)(6). Federal jurisdiction is exclusive. § 252(e)(4)

("No State court shall have jurisdiction to review the action of a State commission in approving or rejecting an agreement under this section [252]"). Determinations of the FCC are reviewed by a federal court of appeals under the Hobbs Act, 28 U.S.C. § 2342(1). *See* § 252(e)(6) (providing for "judicial review of the [FCC's] actions" when it assumes state commission's duties under 1996 Act).

2. The Illinois Litigation

a. *ICC Proceedings*. The ICC petitioners' request for review stems from the ICC's voluntary decision to participate in the Act's arbitration and approval process. MCI WORLDCOM Network Services, Inc. and MCImetro Access Transmission Services, Inc. ("MCI") entered into negotiations over an interconnection agreement with Illinois Bell Telephone Cos., d/b/a Ameritech Illinois ("Ameritech Illinois"). When no final agreement was reached voluntarily, the ICC agreed to arbitrate the disputes and ultimately approved an agreement. Dissatisfied with the ICC's actions, MCI filed suit in the federal court against Ameritech Illinois, the ICC, and the individual commissioners in their official capacities (collectively, the "ICC defendants"). Ameritech Illinois then filed a cross-claim challenging various other aspects of the ICC's determinations. The ICC defendants moved to dismiss these claims, asserting sovereign immunity under the Eleventh Amendment.

b. *District Court Proceedings*. The district court denied the motions to dismiss. ICC Pet. App. 74a-104a. It first ruled that "Congress made it expressly clear that participation in the [Act's] regulatory scheme requires review in federal court," and that "[b]y participating

voluntarily in the regulatory scheme, [the ICC defendants] have consented to suit." *Id.* at 89a-90a. The court also held that, even absent consent, "the doctrine of *Ex parte Young* allows these [claims] to proceed against the Commissioners in their official capacities because they involve ongoing violations of federal law and seek prospective relief." *Id.* at 102a.

c. *Initial Appellate Proceedings.* The ICC defendants took an interlocutory appeal and, in an opinion issued on February 10, 1999 and amended on June 23, 1999, the Seventh Circuit affirmed the Illinois district court's rejection of the Eleventh Amendment defense. *Id.* at 55a-73a.[2] It held that "by electing to assume responsibility for the arbitration contemplated by the Act, the defendants waived the State's immunity from suit in federal court," because the Act makes it sufficiently clear that such participation waives the state's immunity. *Id.* at 73a.

Soon thereafter, however, this Court issued its ruling in *College Savings Bank v. Florida Prepaid Post-secondary Education Expense Board*, 527 U.S. 666 (1999), addressing waiver of the Eleventh Amendment. The Seventh Circuit granted rehearing and asked for briefing on the effect of *College Savings.*

3. The Wisconsin Litigation

a. PSCW Proceedings. The Wisconsin portion of these consolidated cases actually involves three separate

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[2] The Illinois appeal originally included two other cases in which the plaintiffs were AT&T Communications and Ameritech Illinois. Those cases, however, were voluntarily dismissed. *See* ICC Pet. App. 57a nn.1-2.

federal cases. In the first, the PSCW had interpreted and enforced two previously approved interconnection agreements -- one between Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("Ameritech Wisconsin") and TCG Milwaukee, Inc. ("TCG" or "AT&T"), and the other between Ameritech Wisconsin and Time Warner Telecom of Wisconsin, L.P. ("Time Warner"). Ameritech Wisconsin disagreed with the PSCW's actions and brought suit in federal district court, naming as defendants TCG, Time Warner, and the PSCW and the individual commissioners in their official capacities (collectively, the "PSCW defendants").

The second case concerns the PSCW's determinations relating to an SGAT filed by Ameritech Wisconsin. *See* p. 3 *supra* (describing SGATs). The PSCW chose to review this filing, and several new entrants opposed aspects of the proposed SGAT in the proceedings before the PSCW. The PSCW adopted the positions of the new entrants, requiring Ameritech to modify its SGAT to comply with the Act. Ameritech Wisconsin sought review of that decision in a suit in the federal district court against the PSCW defendants. Three new entrants, AT&T, MCI, and US Xchange, sought to intervene in that action as defendants, explaining that they would be adversely affected by any decision overturning the PSCW's SGAT determination. The district court denied the intervention motions on the grounds that the new entrants' interests were adequately presented by the PSCW.

The third case involves the PSCW's determinations in arbitrating and approving a single interconnection agreement between Ameritech Wisconsin and MCI. The PSCW opted to approve a final Ameritech/MCI

interconnection agreement pursuant to § 252. Believing they were aggrieved by some of the PSCW's actions, Ameritech Wisconsin and MCI sued each other and the PSCW defendants in federal district court.

The district court consolidated the three suits, and the United States intervened. In each of the cases, the PSCW and the PSCW defendants filed motions to dismiss under the Eleventh Amendment.

b. *District Court Proceedings.* The district court reviewed all three motions together. PSCW Pet. App. 49a-76a. The court ruled that the PSCW defendants are immune from § 252(e)(6) suits under the Eleventh Amendment. First, the court explained that the Commerce Clause does not give Congress the power to abrogate Eleventh Amendment immunity. *Id.* at 58a-59a. Second, the court found that the PSCW had not waived its Eleventh Amendment immunity by choosing to help administer the Act. *Id.* at 59a-67a. Although the court found that the Act makes clear that a state that participates in the Act's administration will be subject to federal court jurisdiction, *id.* at 60a-61a, the court concluded that no proper waiver follows therefrom because state participation in the Act's administration is not voluntary. *Id.* at 65a-67a. Third, the court ruled that applying the doctrine of *Ex parte Young* to these suits would improperly supplant the specific judicial remedy created by Congress in § 252(e)(6). *Id.* at 68a-73a. Finally, in order to determine whether its Eleventh Amendment ruling required dismissal of these cases in their entirety, the court ordered the parties to brief whether the cases could continue without joinder of the PSCW defendants. *Id.* at 75a.

By the time the district court issued its second decision on whether the cases could proceed without the PSCW defendants, PSCW Pet. App. 77a-94a, the Seventh Circuit had issued its 1999 opinion in the Illinois case holding that a state waives the Eleventh Amendment by choosing to administer the Act. *See* ICC Pet. App. 55a-73a. In addition, this Court had issued its ruling in *College Savings*. Relying on the latter, the district court declined to alter its prior ruling, holding that *College Savings* had fatally undermined the Seventh Circuit's waiver analysis. PSCW Pet. App. 85a-86a. The district court also reiterated its finding that *Ex parte Young*, 209 U.S. 123 (1908), did not apply. PSCW Pet. App. 88a. Finally, having found that "the state commission is required for jurisdiction" under § 252(e)(6), the court held that the suits could not continue in the PSCW defendants' absence. PSCW Pet. App. 89a-93a. The court accordingly dismissed all of the suits for lack of subject-matter jurisdiction. *Id.* at 93a.

4. The Ruling Below

The Illinois appeal, on rehearing, was consolidated with respondents' initial appeals in the Wisconsin case. On July 24, 2000, the Seventh Circuit issued a decision affirming the Illinois court's rejection of Eleventh Amendment immunity and reversing the dismissal of the Wisconsin cases. PSCW Pet. App. 48a. First, it held that, while there are "boundaries for congressional attempts to obtain waivers from states," the waivers obtained from states that choose to participate in the Act's regulatory scheme were proper. *Id.* at 31a. It explained that Congress clearly "intended to provide for federal court review of any regulatory determination made under" § 252, *id.* at 33a, and that states that voluntarily accept

Congress's invitation to be a "'deputized' federal regulator" under § 252 cannot subsequently claim that their authority to regulate originates in "their own sovereign authority." *Id.* at 37a.

In so doing, the Seventh Circuit rejected the PSCW and ICC petitioners' argument that this Court, in *College Savings*, invalidated all "so-called 'constructive' or 'implied' waivers." *Id.* at 30a. It explained that "[t]he Court in *College Savings* limited its abandonment of 'constructive' or 'implied' waivers to the 'ill conceived' 'constructive-waiver experiment of *Parden* [*v. Terminal Railway of the Alabama Docks Department*, 377 U.S. 184 (1964)],'" where the Court had held that a state waived its immunity by merely engaging in activity that is regulated by Congress. *Id.* The Seventh Circuit went on to illustrate the "fundamentally different" waivers that, under *College Savings*, "Congress may still obtain from the states." *Id.* at 30a-31a (discussing states' waiver of immunity by entering into an interstate compact that required Congress's approval pursuant to the Compact Clause in *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), and states' waiver of immunity once they have accepted federal funds allocated under Congress's Spending Power in *South Dakota v. Dole*, 483 U.S. 203 (1987)). These types of waiver illustrated that when petitioners accepted the gratuity of participating in a federal regulatory scheme, they necessarily caused a valid waiver of Eleventh Amendment immunity.

Second, the Seventh Circuit held that, "[a]s an independent basis for decision . . . the Eleventh Amendment does not bar the carriers from pursuing" *Ex parte Young* actions against the individual members of the state commissions in their official capacities. PSCW Pet.

App. 40a. The Court agreed with the two other circuits that have ruled on the issue that suits brought pursuant to § 252(e)(6) "are 'straightforward' *Ex parte Young* cases." *Id.* at 41a (citing *MCI Telecommunications Corp. v. Public Service Comm'n of Utah*, 216 F.3d 929, 934 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-598); *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 54 (2000)). It rejected petitioners' argument that a suit challenging a state commission's § 252(e) determination could not be brought under *Ex parte Young* because the relief sought would be retrospective in nature. The court explained that "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." PSCW Pet. App. at 42a.

The court also rejected petitioners' attempt to liken the present case to *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), and *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997). The court explained that, unlike the Indian Gaming Regulatory Act in *Seminole Tribe*, the 1996 Act does not create a "'detailed remedial scheme' that manifests Congress' intent to limit the scope of statutory remedies available to parties aggrieved by the commissioners' interconnection determinations." *Id.* at 42a-43a. The court also explained that the "special sovereignty interests" that a state has in title over land and water within its borders and that were at stake in *Coeur d'Alene* "cannot be equated" with states' "interests in the regulation of telecommunication providers." *Id.* at 46a. Any independent interests that the states may have had in regulating interconnection agreements between carriers

and SGATs were validly extinguished by Congress with the 1996 Act. *Id.* at 46a-47a.

5. Relevant Events Following Appeal

Shortly after the Seventh Circuit issued its opinion and entered judgment against the two state commissions on July 24, 2000, the ICC defendants moved to stay the court's mandate pursuant to Federal Rule of Appellate Procedure 41(d)(2) pending the filing of a petition for a writ of certiorari in the Supreme Court. The Seventh Circuit denied the motion. Thus, the mandate issued, and jurisdiction was returned to the district court.

On October 10, 2000, MCI and Ameritech moved the district court for the Northern District of Illinois to dismiss voluntarily all of their claims because the interconnection agreement at issue was going to expire. Their motion was granted. *See* ICC Pet. at 8. In a motion filed with the Seventh Circuit on October 23, 2000, the ICC defendants moved to have the court of appeals' opinion recalled and the judgment vacated because of the district court's dismissal order. *See id.* That motion was denied in a summary order on November 15, 2000.

REASONS FOR DENYING THE PETITIONS

Review should be denied in these cases. To begin with, the Illinois case is moot. Moreover, there are no conflicts among the circuits as to any of the questions presented, and petitioners identify no independent reason justifying this Court's review.

Although petitioners place the greatest emphasis on the waiver issue, the Seventh Circuit's ruling on the *Ex*

parte Young question is plainly correct, clearly not worthy of review, and sufficient on its own to justify the review of state commission actions that petitioners seek to block. Three circuits have now held that a lawsuit challenging approval of an interconnection agreement is properly brought against state public utility commissioners in federal court pursuant to *Ex parte Young* because (1) such a suit seeks prospective relief from an ongoing violation of federal law, and (2) nothing in the Act precludes reliance on *Ex parte Young*. There is no circuit split on this issue, and the arguments against application of *Ex parte Young* offered in the petitions suggest no reason to second-guess the prevailing consensus.

Because this case could properly be brought under *Ex parte Young*, it follows that a decision by the Court on the first Question Presented in both petitions – whether petitioners validly waived the Eleventh Amendment – will have no practical impact on any party. At the most, a ruling that petitioners did not waive the Eleventh Amendment would require amendment of the caption of these cases to limit the defendants to the commissioners in their official capacity. Given the Court's oft-expressed reluctance to review abstract issues of law that will have little or no practical importance in the case at hand, that fact alone would be a sufficient basis to deny review on the waiver issue. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

In any event, even on its own terms, the waiver issue does not warrant review. The Seventh Circuit's finding of waiver conflicts with no decision in any other circuit. Nor is it inconsistent with *College Savings*. To the contrary, in *College Savings*, the Court recognized that it is well within Congress's power to condition receipt of a benefit

on a state's waiver of the Eleventh Amendment. That analysis applies here, where Congress largely preempted state regulation of an area of interstate commerce and then provided that a waiver of the Eleventh Amendment would result if state regulators deliberately and voluntarily accepted the benefit of participating in the new federal regulatory scheme.

Finally, the additional Questions Presented in the Wisconsin petition add little to the already weak argument for Supreme Court review in this case. The waiver argument fares no better when transformed into a Tenth Amendment "coercion" claim. In fact, this Court's Tenth Amendment cases strongly support Congress's power to regulate an area of interstate commerce and offer the states a chance to participate only on the terms set by Congress. The remaining question in the Wisconsin petition appears to be more or less a reiteration of unpersuasive points already made in the earlier discussion of waiver.

I. The Illinois Case Is Moot.

The case involving the ICC petitioners is moot because the case has been dismissed by the district court. The carriers – the aggrieved parties – voluntarily filed a joint motion requesting a dismissal of the case on mootness grounds. The district court granted the motion. *See* ICC Pet. at 8. In a subsequent brief before the Seventh Circuit, the ICC defendants agreed with the carriers and the district court that the case was moot. *See id.*

The Court has taught that a "case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *County of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (internal

quotation and citation omitted); *see also City of Erie v. Pap's A.M.*, 120 S. Ct. 1382, 1390 (2000); *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70-71 (1983); *Powell v. McCormack*, 395 U.S. 486, 496 (1969). Since there is no longer a live controversy with regard to the MCI-Ameritech agreement approved by the ICC, the ICC petitioners' current attempt to seek review of a strictly jurisdictional question from this Court should be summarily rejected. *See City of Erie*, 120 S. Ct. at 1390 ("The underlying concern [of the mootness doctrine] is that, when the challenged conduct ceases such that 'there is no reasonable expectation that the wrong will be repeated,' then it becomes impossible for the court to grant 'any effectual relief whatever' to [the] prevailing party. In that case, any opinion as to the legality of the challenged action would be advisory.") (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)).[3]

II. The Seventh Circuit's Reliance on *Ex parte Young* Does Not Warrant Review.

The PSCW petitioners' arguments for review by this Court are also severely undermined by their inability to make a plausible case for review of the *Ex parte Young* issue set forth in the fourth Question Presented. Three circuits have now held that a case like this one is a "straightforward *Ex parte Young* case." *Michigan Bell Tel. Co. v. Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir. 2000),

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[3] The Seventh Circuit has already addressed whether the mooting of the Illinois case requires that the ruling below be vacated. *See* supra p. 10. It summarily rejected the ICC petitioners' motion to vacate, presumably because the same opinion also applies to the Wisconsin cases.

cert. denied, 121 S. Ct. 54 (2000); *see* PSCW Pet. App. 41a (Seventh Circuit case below); *MCI Telecommunications Corp. v. Public Serv. Comm'n of Utah*, 216 F.3d 929, 939-40 (10th Cir. 2000), *petition for cert. filed*, 69 U.S.L.W. 3282 (U.S. Sept. 18, 2000) (No. 00-593).[4] There is no reason to question that consensus position.

This Court has recently recognized that *Ex parte Young* is an "essential part of our sovereign immunity doctrine." *Alden v. Maine*, 527 U.S. 706, 748 (1999). Under the *Ex parte Young* rule, a lawsuit in federal court against state officials, seeking prospective relief from ongoing violations of federal law, is not treated as implicating a state's immunity under the Eleventh Amendment. *See Coeur d'Alene*, 521 U.S. at 294 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting). These standards are plainly met here. Indeed, this Court has often recognized that *Ex parte Young*

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[4] In addition, the vast majority of district courts – over two dozen – that have ruled on this question have found that the Eleventh Amendment is not a bar to an *Ex parte Young* action commenced pursuant to § 252(e)(6). *See, e.g., Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. Serna*, No. Civ 97-124, 1998 U.S. Dist. LEXIS 23024 (D.N.M. Mar. 31, 1998); *AT&T Communications of the S. States, Inc. v. BellSouth Telecommunications, Inc.*, 60 F. Supp. 2d. 1279 (N.D. Fla. 1997); *GTE Fla., Inc. v. Clark*, 60 F. Supp. 2d 1277 (N.D. Fla. 1997); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or. 1998); *US West Communications, Inc,v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

provides a proper vehicle for federal-court review of state commission decisions. *E.g., Alabama Pub. Serv. Comm'n v. Southern Ry. Co.*, 341 U.S. 341, 344 n.4 (1951) (referring to the "many cases prior to and following *Ex parte Young* . . . in which this Court has granted . . . relief"); *Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 230-31 (1908).

Thus, petitioners are left with the option of trying to make this case look like *Seminole Tribe*. In fact, however, there is nothing in the 1996 Act that would suggest that reliance on *Ex parte Young* is somehow precluded. Section 252(e)(6) simply authorizes an aggrieved party to bring an action in federal court to "determine whether [an interconnection] agreement or statement [approved or rejected by a state commission or the FCC] meets the requirements of section[s] 251" and 252. That section raises none of the concerns presented in *Seminole Tribe*.

In *Seminole Tribe*, the Court reviewed the "carefully crafted and intricate remedial scheme" of the Indian Gaming Regulatory Act ("IGRA") in which "Congress intended . . . not only to define, but also to limit significantly, the duty imposed" on federal courts by the statute. 517 U.S. at 73-74. The Court held that the IGRA was unique insofar as it prescribed a very formal and intricate mediation scheme in which federal district courts play an extremely limited part. *Id.* at 75. For example, although the IGRA authorized federal courts to order a state to negotiate in good faith, it explicitly prohibited a court from enforcing its own order with contempt sanctions, as it normally would have the power to do. *Id.* at 74-75. Thus, the *Seminole Tribe* Court saw a clear inconsistency between the limited remedies available

under IGRA and an *Ex parte Young* action, where the typical remedy is an injunction and contempt sanctions are available.

Here, as the Seventh Circuit held, there is nothing in § 252 that would limit federal court review in a remotely comparable manner. *See* PSCW Pet. App. 42a-43a. In fact, allowing *Ex parte Young* suits to proceed pursuant to § 252(e) only realizes Congress's intention to allow federal courts to address ongoing violations of federal law by state officials. Unlike the IGRA, for example, the Act does not prohibit courts from ordering any equitable remedies. Absent an express limitation, federal courts "presume the availability of all appropriate remedies" under a federal statute. *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60, 66 (1992).

Seminole Tribe also held that IGRA specifically requires that "the state" be named as the defendant in any lawsuit under that statute, and that no individual state officer or group of officers, if sued in their official capacities under *Ex parte Young*, would be functionally equivalent to "the state" for purposes of carrying out its duties under IGRA. 517 U.S. at 75 n.17. The Court saw this as further confirmation that Congress contemplated suits against states and not *Ex parte Young* actions against individual state officers. *Id.* at 75-76 & n.17.

Here, by contrast, nothing in the Act requires that actions be brought against "the state." Section 252 does not specify who must be a party in federal court, but simply provides for "Review Of State Commission Actions." Because *Ex parte Young* is the traditional mechanism for such review in federal court, the natural inference from the statutory text is that Congress intended such suits to be brought on that basis. Moreover, the term

"state commission" is defined in the Act to include any "commission, board, or official (by whatever name designated)" exercising jurisdiction over intrastate operations of carriers. § 153(41). Contrary to petitioners' claims, PSCW Pet. at 28-29; ICC Pet. at 20-23, that definition is certainly broad enough to include the Commissioners, sued in their official capacity, who are the proper defendants in an *Ex parte Young* action.

In sum, it is hard to imagine a statutory remedy more synonymous with *Ex parte Young* than that provided by Congress here. Certainly the fact that the statute refers expressly to a federal cause of action cannot, without more, preclude reliance on *Ex parte Young*. That would flout, rather than vindicate, the intent of Congress.

The PSCW petitioners go on to argue that *Ex parte Young* does not apply where, as here, the state courts could provide an alternative forum. PSCW Pet. at 29-30. But the state courts are an alternative forum in nearly all cases where *Ex parte Young* authorizes a suit in federal court to vindicate federal law – including the paradigmatic case of a suit under 42 U.S.C. § 1983 seeking an injunction to enforce federal rights.[5]

The ICC petitioners argue that *Ex parte Young* applies *only* in constitutional cases. ICC Pet. at 23-27. But that argument is equally misplaced. It completely misapprehends the *Ex parte Young* doctrine and this Court's holdings. *See, e.g. Coeur d'Alene*, 521 U.S. at 270 (*Ex parte Young* actions exist "to ensure the

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[5] Moreover, the Act provides that, at least as to a commission decision approving or rejecting an interconnection agreement, review in federal court is the exclusive remedy. § 252(e)(4).

supremacy of federal statutory and constitutional law"); *Seminole Tribe*, 517 U.S. at 73-74 (reaffirming that a proper *Ex parte Young* suit is one that seeks to challenge the "continuing violation of federal law"); *Edelman v. Jordan*, 415 U.S. 651, 677 (1974) (barring suit in statutory case only to the extent plaintiffs sought retrospective relief). The Court has never limited the doctrine in the manner petitioners imagine.

Finally, it is baseless for the ICC petitioners to claim that the relief sought here is retrospective, and thus unavailable under *Ex parte Young*. ICC Pet. at 28-29. As the Seventh Circuit correctly held:

> The challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law. . . . Such relief is precisely the type contemplated by the *Ex parte Young* doctrine.

PSCW Pet. App. 42a (citation omitted).

Given the unanimity among the circuits on the application of *Ex parte Young* in actions under section 252, and the fact that the Court has twice denied review on this precise question during this Term,[6] there is no reason whatsoever to second-guess the Seventh Circuit's ruling on this issue. That, in turn, is by itself a sufficient reason to deny review on the separate question whether petitioners

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[6] *Strand v. Michigan Bell Tel.*, 121 S. Ct. 54 (cert. denied Oct. 2, 2000); *Strand v. Verizon North, Inc.*, 121 S. Ct. 380 (cert. denied Oct. 30, 2000).

waived the Eleventh Amendment. Where a case can be decided on a ground that is relatively simple and non-controversial, this Court's practice is not to reach out and address additional issues presented by the petitioner or discussed in the lower courts, if they would not affect the outcome of the case. *See, e.g., The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the question before it] can await a day when the issue is posed less abstractly.").[7] *See generally* Robert L. Stern, *et al.*, SUPREME COURT PRACTICE, § 4.4, 172-73 (7th ed., 1993) ("If it appears that upon a grant of certiorari the Supreme Court might be able to decide the case on another ground and thus not reach the point upon which there is conflict, the conflict itself may not be sufficient reason for granting review.") (cases cited omitted). The Court should follow the same practice here – denying review of issues that would remain purely "academic" unless and until the Court also overturned the Seventh Circuit's *Ex parte Young* ruling.

III. The Waiver Issue Does Not Warrant Review.

Even if the issue were squarely presented here in a non-abstract way, there would be no persuasive reason for the Court to review the Seventh Circuit's ruling that state commissions waive immunity when they undertake to review

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[7] In *The Monrosa*, the Court granted review to address the enforceability of a forum selection clause in a bill of lading. Having determined, however, that the case could be resolved on the alternative ground that the clause at issue did not cover actions *in rem*, the Court declined to address the enforceability issue. 359 U.S. at 184.

or apply interconnection agreements under the Act. Here again, although petitioners claim that the federal courts are in disarray on this question, the Tenth Circuit – the only other court of appeals to have addressed the question – is in agreement with the Seventh Circuit. *MCI Telecommunications Corp.*, 216 F.3d at 936-39.[8] Moreover, both circuits have faithfully followed this Court's teachings in *College Savings*.[9]

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[8] Petitioners cite three rulings of courts of appeals in support of their claim of disarray on this issue. PSCW Pet. at 17-18; ICC Pet. at 18-19. In the first, *GTE North, Inc. v. Strand*, 209 F.3d 909 (6th Cir. 2000), *cert. denied*, 121 S. Ct. 380 (2000), the only reference to the Eleventh Amendment is pure dicta in a footnote. *See id.* at 922 n.6. The state commission, as a corporate entity, was not even a defendant in *Strand* and the Sixth Circuit determined that the waiver issue was not presented because *Ex parte Young* applied.

The second case cited by petitioners, *Burnette v. Carothers*, 192 F.3d 52 (2d Cir. 1999), *petition for cert. filed*, 69 U.S.L.W. 3296 (U.S. Oct. 16, 2000) (No. 00-610), did not concern the 1996 Act. Moreover, plaintiff-appellants in *Burnette* relied on *Parden v. Terminal Railway of Alabama State Docks Department*, 377 U.S. 184 (1964), an opinion that was overruled by *College Savings* shortly after plaintiff-appellants there presented oral argument. 192 F.3d at 60. Finally, petitioners cite *Chavez v. Arte Publico Press*, 204 F.3d 601 (5th Cir. 2000). That case also did not involve the 1996 Act and dealt with the question of the states' authority to *abrogate* Eleventh Amendment immunity under the Fourteenth Amendment.

[9] As with *Ex parte Young*, the vast majority of district courts that have ruled on the waiver question have held that states voluntarily waive their sovereign immunity when they willfully participate in the Act's regulatory scheme. See, e.g., *Bell Atlantic-Pennsylvania, Inc., v. Pennsylvania Pub. Util. Comm'n*, 107 F. Supp. 2d 653 (E.D. Pa. 2000); *AT&T Communications of the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932 (W.D. Mo. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218 (D. Del. 2000); *Bell Atlantic-Delaware, Inc. v. Global NAPS South, Inc.*, 77 F. Supp. 2d 492 (D. Del. 1999); *US West Communications, Inc. v. MFS Intelenet, Inc.*, 35 F. Supp. 2d 1221 (D. Or.

In *College Savings*, the Court recognized that Eleventh Amendment immunity may be waived, but it emphasized that such a waiver must be clear and voluntary. 527 U.S. at 666, 679. *See also Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 238 n.1 (1985) (there must be an "unequivocal indication that the State intends to consent to federal jurisdiction that otherwise would be barred by the Eleventh Amendment"). The Court's particular concern was a form of "constructive waiver" that is effectively indistinguishable from abrogation – *i.e.*, where Congress simply "deems" some ongoing state conduct to be a waiver. 527 U.S. at 681-83 (discussing *Parden v. Terminal R. Co. of Ala. Docks Dept.*, 377 U.S. 184 (1964)). To allay that concern, the Court created an irrebuttable presumption that a federal law requiring states to waive immunity in order to be allowed to continue engaging in some "otherwise lawful activity" does not lead to a clear and voluntary waiver. *Id.* at 687 ("[W]e think . . . the point of coercion is automatically passed – and the voluntariness of waiver destroyed – when what is attached to the refusal to waive is the exclusion of the State from otherwise lawful activity.")

But the Court did not bar all waivers effected through voluntary conduct. To the contrary, it stated that states do validly waive immunity when they knowingly accept a gratuitous federal benefit expressly tied to a waiver. The Court illustrated this point by distinguishing two important cases in which statutory conditions placed on states by Congress were upheld although waiver was not formally

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1998); *MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, 9 F. Supp. 2d 766 (E.D. Ky. 1998); *US West Communications, Inc. v. TCG Seattle*, 971 F. Supp. 1365 (W.D. Wash. 1997); *US West Communications, Inc. v. Reinbold*, Civil No. A1-97-25, 1997 U.S. Dist. LEXIS 22606 (D.N.D. July 28, 1997).

declared by the states. *Id.* at 686-87. The Court recognized that *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), "held that a bistate commission which had been created pursuant to an interstate compact (and which we assumed partook of state sovereign immunity) had consented to suit by reason of a suability provision attached to the congressional approval of the compact." 527 U.S. at 686. It also noted that *South Dakota v. Dole*, 483 U.S. 203 (1987), held "that Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions." 527 U.S. at 686. The *College Savings* Court explained that, pursuant to the Article I provisions at play in *Petty* and *Dole*, Congress was under no "obligation" to give states the "gratuity" or "gift" obtained, *id.* at 686-87, and that the states, in those cases, were not coerced into waiving their Eleventh Amendment immunity in order to engage in "otherwise lawful activity." The cases thus illustrated how valid waivers could occur through acceptance of conditional benefits. *Id.* at 687.

Here, the Seventh Circuit followed *College Savings* in holding that the PSCW and ICC defendants voluntarily waived their sovereign immunity when they decided to arbitrate or approve the disputes at the core of this case. PSCW Pet. App. 28a-32a. Pursuant to the teachings in *College Savings*, the court "[could] not accept the commissions' argument that all constructive waivers are now foreclosed." *Id.* at 30a-31a (discussing *Petty* and *Dole*). Instead, the Seventh Circuit understood "the Court's holding in *College Savings* to set boundaries for congressional attempts to obtain waivers from states" by doing away with the *Parden*-styled "forced waiver" in which a "state is threatened with the sanction of waiving its immunity if it

engages in a regulated enterprise." *Id.* at 31a (citing *College Savings*, 527 U.S. at 683, 690).

This case, by contrast, involves a new federal regulatory program in which states may voluntarily choose to participate. Because Congress has set terms for that participation, regulation of carrier-to-carrier agreements concerning local interconnection "is no longer an 'otherwise permissible activity' for states." PSCW Pet. App. 40a. The states "are free to accept or reject the terms Congress has offered," *id.*, but if they accept the "regulatory power offered by Congress, [they] must accept the condition that was attached" – "submi[ssion] to federal jurisdiction to review their actions." *Id.* at 38a.[10]

Petitioners' primary argument for the claim that they should be allowed to accept the benefit of participation in the section 252 process while evading the federal judicial review that goes with it relates to the scope of preemption of state law by the Act. Petitioners assert that Congress did not and could not preempt "*all* state jurisdiction over local telecommunications competition as a necessary predicate to the gratuity," because the Act does not contain an express statement making "such a broad preemption." PSCW Pet. at 15; *see also* ICC Pet. at 17-18. They go on to assert that the Seventh and Tenth Circuits' holdings are "flawed" because they "rest[] on the bare assertion that, '[a]lthough it did not do so, Congress *could have* preempted all regulation of local

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[10] The FCC has made clear that it stands ready to step in if a state commission chooses not to participate in the regulatory scheme, including at the stage of enforcing interconnection agreements. *See In re Starpower Communications, LLC, Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52, Memorandum Opinion and Order, FCC 00-216 (June 14, 2000).

phone service'." PSCW Pet. at 15 (citing *MCI Telecommunications Corp. v. Public Service Comm'n of Utah*, 216 F.3d at 938).[11] They conclude that the real issue here is "whether a state's existing, un-preempted *police power presence* in local telecommunications competition could lead to the waiver of Eleventh Amendment immunity." *Id.* at 17 (emphasis added).

This argument is utterly unpersuasive. It is true that the Act does not completely foreclose the operation of state law in the area of telecommunications addressed by sections 251 and 252. State laws may continue to be applied to the extent they supplement and are consistent with the Act. §§ 252(e)(3), 253. But it is not the application of state law – *i.e.*, the exercise of police power – that triggers the waiver. The waiver occurs if a state chooses to apply *federal* standards in a *federally* prescribed arbitration process,

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[11] The ICC petitioners make the additional argument that "[t]he Act does not inform states with the clarity required by this Court that performing the regulatory responsibilities given to them will result in waiver of their sovereign immunity." ICC Pet. at 19. Again, they rely on a completely unrelated case to support this argument. *Id.* (citing *United States v. Nordic Village*, 503 U.S. 30 (1992)). Moreover, the Seventh Circuit carefully examined this contention and concluded that Congress had "expressed unmistakably" its insistence on federal court review of the actions of states choosing to participate under the Act. PSCW Pet. App. 34a.

The ICC petitioners also argue that Congress may not offer the states an invitation to waive immunity in return for a "gratuity" in a statute premised on the Commerce Clause. ICC Pet. at 11-14. Here again, the Seventh Circuit addressed this argument persuasively. PSCW Pet. App. 35a-36a.

replacing the FCC in that role.[12]

Certainly there can be no doubt that Congress has imposed detailed federal standards and procedure governing the area of local interconnection. As the Court noted in *AT&T Corp.*:

> [T]he question . . . is not whether the Federal Government has taken the regulation of local telecommunications competition away from the States. With regard to the matters addressed by the 1996 Act, it unquestionably has.

525 U.S. at 378 n.6. For that reason, the Court added, "there is no doubt . . . that if federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Id.*[13]

Given that reality, it would make no sense to hold that petitioners' conditional waiver of the Eleventh Amendment was invalid because Congress did not preempt state law in a

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[12] The PSCW petitioners also include a third Question Presented and a corresponding section of the Petition, PSCW Pet. at 23-27, arguing that the Act does not evince a congressional intent to preempt all state jurisdiction over local interconnection. This argument adds little or nothing to petitioners' flawed discussion of waiver.

[13] The local competition provisions of the Act concern only one narrow (albeit important) slice of regulation: the terms and conditions of interconnection *between competing phone companies*. *See Puerto Rico Tel. Co. v. Telecommunication Regulatory Board of Puerto Rico*, 189 F.3d 1, 8, 12-13 (1st Cir. 1999). States, therefore, retain the regulatory powers over local telephone service that they may choose to exercise outside the sphere of interconnection agreements, including any power under state law to regulate the terms and conditions under which telephone companies offer local service to subscribers. *See* § 253(b); *Puerto Rico Tel.*, 189 F.3d at 12.

fully comprehensive fashion. Congress created a new federal program that "federalized" much of a given area of telecommunications regulation. A state's participation in that program can validly be conditioned on acceptance of federal judicial review, even if some aspects of applicable state law remain operative.

IV. The Wisconsin Petitioners' Tenth Amendment Argument Does Not Warrant Review.

The PSCW petitioners go on to claim that the Act violates the Tenth Amendment because it "coerces," and does "not merely encourage," states to waive their constitutionally protected sovereign immunity. PSCW Pet. at 19; *see also* ICC Pet. at 13-14 (Congress has "demand[ed], as a condition for state participation in the federal scheme, a waiver of the state's immunity"). This coercion is said to arise because a state's decision not to participate in the arbitration and approval of § 252 interconnection agreement would, as a practical matter, leave the state with no ability to apply its state law and policies to the same matter. PSCW Pet. at 20-22. Petitioners rely on *FERC v. Mississippi*, 456 U.S. 742 (1982), as authority for the proposition that this level of "coercion" violates the Tenth Amendment. PSCW Pet. at 20.

In fact, however, *FERC v. Mississippi* and the related Tenth Amendment rulings of this Court strongly support what Congress did in the Act. They stand for the proposition that Congress may impose federal regulation on an area of interstate commerce previously regulated by the states, and then pursue "cooperative federalism" by giving the states the choice of regulating consistent with federal requirements or not at all.

Thus, the Court in *FERC v. Mississippi* held that the law at issue did not compel "the States to enact a legislative program," but "simply condition[ed] continued state involvement in a pre-emptible area on the consideration of federal proposals." *FERC*, 456 U.S. at 765. The law was held to be a proper exercise of Congress' power to "pre-empt the States entirely in the regulation of private utilities." *Id.* at 764.

Here, as in *FERC*, the Act does not "commandeer" states to administer federal law. "To the contrary, [the Act] offers the States a vehicle for remaining active in an area of overriding concern," although in a more limited capacity. *Id.* at 766. Petitioners, in turn, *voluntarily* accepted Congress's invitation to participate when they chose to entertain the disputes, arbitrate negotiations, directed the parties to prepare agreements and statements, and approved the submitted agreements and statements in accordance with the Act. PSCW Pet. at 3-4. They certainly were not coerced with the threat of sanction or being barred from engaging in an "otherwise lawful activity." Petitioners' participation in the administration of the Act was a "gratuity" that Congress was free to grant (or withhold) at its pleasure.

The Tenth Circuit, the only other court of appeals to have entered judgment on this question, is in lock-step with the Seventh Circuit on this question. *See MCI Telecommunications Corp.*, 216 F.3d at 938 ("[The Act] invites states to participate in the federal government's regulation of local telephone service. Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity. . . . Thus, § 252 puts [the states] on notice that Congress intends to subject it to suits brought by individuals if it acts under § 252.").

In sum, petitioners have not identified a conflict in the circuits on any of the questions presented, and have given no other reason justifying this Court's review.

CONCLUSION

The petitions should be denied.

Respectfully submitted,

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DEC 22 2000

OFFICE OF THE CLERK

Nos. 00-653 and 00-744

In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.

ILLINOIS COMMERCE COMMISSION, ET AL., PETITIONERS

v.

MCI TELECOMMUNICATIONS CORP., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, establishes comprehensive procedures to open local telecommunications markets to competition through the formation of interconnection agreements between incumbent local exchange carriers and potential competitors providing, *inter alia*, for the lease of incumbent carriers' network elements. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over those agreements and provides that such exercises of authority are subject to review in federal court. The questions presented in this case are:

1. Whether a state public utility commission's voluntary acceptance of Congress's offer to exercise regulatory authority pursuant to the scheme set forth in the 1996 Act constitutes a waiver of immunity from suit in federal court, where the Act clearly provides for review in federal court of a state commission's actions.

2. Whether, in the alternative, the commissioners of a state public utility commission are amenable to suit under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), in an action seeking prospective injunctive relief from orders by the state commission alleged to violate federal law.

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In the Supreme Court of the United States

No. 00-653

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL., PETITIONERS

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.

No. 00-744

ILLINOIS COMMERCE COMMISSION, ET AL., PETITIONERS

v.

MCI TELECOMMUNICATIONS CORP., ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (PSCW Pet. App. 1a-48a; ICC Pet. App. 1a-54a) is reported at 222 F.3d 323.

JURISDICTION

The judgment of the court of appeals was entered on July 24, 2000. The petition for a writ of certiorari in No. 00-653 was filed on October 23, 2000 (a Monday). On October 18, 2000 , Justice Stevens extended the time within which to file a petition for a writ of certiorari in No. 00-744 to and including November 5, 2000, and the petition was filed on November 6, 2000 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, effected a comprehensive overhaul of telecommunications regulation designed to "open[] all telecommunications markets to competition." H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996); see generally *AT&T* v. *Iowa Utils. Bd.*, 525 U.S. 366 (1999). This case concerns the provisions of the 1996 Act aimed at enhancing competition in local telecommunications markets.

1. For many years, most telephone service in the United States was provided by AT&T and its corporate affiliates, collectively known as the Bell System. In 1974, the United States sued AT&T under the Sherman Act, 15 U.S.C. 1, alleging, among other things, that the Bell System had improperly used its monopoly power in local markets to impede competition in the long-distance market. See *United States* v. *AT&T*, 524 F. Supp. 1336 (D.D.C. 1981). In 1982, to settle that lawsuit, AT&T entered into a consent decree that required it to divest its local exchange operations. The newly independent Bell Operating Companies continued to provide monopoly local exchange service in their respective regions. What remained of AT&T continued to

provide nationwide long-distance service. See H.R. Rep. No. 204, 104th Cong., 1st Sess. 48-50 (1995).

a. In considering how to encourage competition in local telecommunications markets, Congress recognized that the economic barriers to entry into those markets would remain formidable, even if the regulatory restrictions on competition were removed. H.R. Conf. Rep. No. 458, *supra*, at 113. It would be economically impracticable, at least with the current technology, for even the largest prospective competitor to duplicate an incumbent carrier's local network—*i.e.*, to create a new network of switches and a new infrastructure of loops connecting every house and business in a calling area to those switches and thus to one another. Moreover, without rights of access to the incumbent's existing network, a prospective competitor could not gradually enter the market through partial duplication of local exchange facilities; the competitor would win few customers if, for example, those customers could call only one another and not customers of the incumbent's separate (and already established) network.

Accordingly, Congress, in Section 251 of the 1996 Act, provided for prospective competitors to enter local telephone markets by using incumbent carriers' own networks in three distinct but complementary ways. First, new entrants are entitled to "interconnect" their networks with those of incumbents, and to do so at rates and on terms and conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(2).[1] Second, new entrants are entitled to gain access to elements of an incumbent's network "on an unbundled basis"—*i.e.*, to lease individual network elements (loops, switching capability, etc.) at rates and on terms and

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[1] All citations of the 1996 Act are of Supp. IV 1998.

conditions that are "just, reasonable, and nondiscriminatory." 47 U.S.C. 251(c)(3). Third, new entrants are entitled to buy an incumbent's retail services "at wholesale rates" and to resell those services to end users. 47 U.S.C. 251(c)(4). Incumbents are also required to provide physical access to their poles, ducts, conduits, and rights-of-way, in order to allow new entrants to install their own facilities, as well as physical access to their premises to permit interconnection among networks. 47 U.S.C. 251(b)(4) and (c)(6).

The 1996 Act requires incumbents to negotiate in good faith with new entrants on agreements regarding interconnection, access to network elements, resale of services, and the other arrangements contemplated by the Act. 47 U.S.C. 251(c). The Act provides for binding arbitration in the event that the parties cannot conclude such "interconnection agreements" through negotiation. 47 U.S.C. 252(e)(5).

b. The 1996 Act permits, but does not require, state public utility commissions to assume regulatory authority over interconnection agreements, set the terms and conditions for those agreements (subject to the standards set forth in the Act and regulations promulgated pursuant to the Act), and exercise review and enforcement authority. If the state commission elects not to assume regulatory authority, the Federal Communications Commission (FCC) will perform that role. 47 U.S.C. 252(e)(5).

Under the 1996 Act, the extent of the regulatory responsibilities of the state public utility commission, or alternatively the FCC, depends, in part, on whether the interconnection agreement was negotiated or arbitrated. A negotiated agreement is subject to review by the state commission (or, if the state com-

mission chooses not to engage in such review, by the FCC) to determine whether the agreement discriminates against non-party carriers and is consistent with the public interest, convenience, and necessity. 47 U.S.C. 252(e)(2)(A).

If the parties are unable to conclude an agreement through negotiation and proceed to arbitration, the state public utility commission (or the FCC) will resolve any open issue, including the rates, terms, and conditions under which the new competitor will enter the local market, as well as prices that both the incumbent and the new entrant will pay one another for transport and termination of calls. The 1996 Act sets forth standards for state commissions to follow in setting such rates; the state commissions are also required to follow FCC regulations issued pursuant to Section 251(d)(1). 47 U.S.C. 252(c). An arbitrated agreement is subject to review by the state commission to determine whether the agreement meets the requirements set forth in the Act. 47 U.S.C. 252(e)(1) and (2)(B). If the state commission does not act to approve or reject an agreement within the allotted time period, the agreement is deemed approved. 47 U.S.C. 252(e)(4).

The 1996 Act provides that any party "aggrieved" by a determination of a state public utility commission approving or rejecting an interconnection agreement may file suit in federal district court for a determination of "whether the agreement * * * meets the requirements of" Sections 251 and 252 of the Act. 47 U.S.C. 252(e)(6). If the FCC rather than the state commission has assumed the regulatory role, the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998), authorizes federal appellate court review of the FCC's orders.

2. The Illinois Commerce Commission (ICC) and the Public Service Commission of Wisconsin (PSCW) have

voluntarily exercised regulatory authority under the 1996 Act. Both state commissions have arbitrated unresolved issues in interconnection agreements between incumbent carriers and new entrants, approved final interconnection agreements, and interpreted and enforced the provisions of existing interconnection agreements.

Carriers "aggrieved" by actions of the ICC or the PSCW, in exercising their authority under the 1996 Act with respect to interconnection agreements, filed suits in federal district court pursuant to Section 252(e)(6). The suits contended that the state commissions acted contrary to the Act in approving, interpreting, and enforcing interconnection agreements (or, in one instance, in rejecting a statement of generally applicable terms or conditions, see 47 U.S.C. 252(f)). Each suit named as defendants both the relevant commission and its individual commissioners.

In each case, the state commission and its commissioners moved to dismiss on Eleventh Amendment immunity grounds. The United States and the FCC intervened to defend the constitutionality of the 1996 Act.

a. In the Illinois cases, the district court denied the motion to dismiss of the ICC and its commissioners on two independent grounds. ICC Pet. App. 74a-104a.

The district court first held that the State had waived its sovereign immunity from suits in federal court challenging the ICC's exercise of authority under the 1996 Act. ICC Pet. App. 88a-92a. The court explained that Congress gave States a choice whether to participate in the federal regulatory scheme created by the Act. *Id.* at 90a. The court further explained that Congress placed the States on clear notice that, if they chose to participate in that federal regulatory scheme,

they would be subject to suit in federal court to assure that their actions conformed to federal law. *Id.* at 89a-90a. The court concluded that the State, through the ICC, had made that voluntary election. *Id.* at 90a, 92a.

Alternatively, the district court held that the individual commissioners of the ICC are subject to suit under the exception to the doctrine of sovereign immunity recognized in *Ex parte Young*, 209 U.S. 123 (1908), which permits suits against state officials to enjoin ongoing violations of federal law. ICC Pet. App. 92a-102a. The court rejected the argument that "the *Ex parte Young* doctrine does not apply * * * because the type of relief sought by the plaintiffs is retrospective"; the court concluded that the relief sought against the commissioners, "an injunction or declaration requiring [them] to follow the [1996] Act in making their regulatory decisions," is "undeniably prospective." *Id.* at 93a-95a. The court also rejected the argument that *Ex parte Young* applies only to violations of the Constitution, not to violations of federal statutes, explaining that *Ex parte Young*'s purpose of "promot-[ing] the vindication of federal rights" is served in both instances. *Id.* at 95a. The court further held that neither *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), nor *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997), precludes the application of the *Ex parte Young* exception in the circumstances of this case. ICC Pet. App. 94a-102a.

The Seventh Circuit affirmed on the ground that a state commission waives immunity from suit by electing to exercise regulatory authority under the 1996 Act. ICC Pet. App. 55a-73a. Shortly after the Seventh Circuit issued that decision, however, this Court issued decisions in three cases involving Eleventh Amendment

issues.[2] In light of those decisions, the Seventh Circuit granted rehearing. *Id.* at 5a-6a.

b. In the Wisconsin cases, the district court granted the motion to dismiss on immunity grounds of the PSCW and its commissioners. PSCW Pet. App. 49a-76a (first decision); *id.* at 77a-94a (second decision).

In its first decision, the district court concluded that the Eleventh Amendment barred suit against the PSCW and its commissioners. PSCW Pet. App. 49a-76a. The court rejected the argument that the PSCW had waived its immunity to suit by choosing to exercise federal regulatory authority. While agreeing that the 1996 Act provides clear notice to state commissions that acceptance of new regulatory authority offered by the 1996 Act would subject them to suit in federal court, *id.* at 60a-61a, the court held that state participation in the new scheme was not "voluntary" because "staying out of the interconnection process cannot be said to be a realistic option for a state commission," *id.* at 67a.

The district court also rejected the argument that review of the PSCW's determinations was permitted under the *Ex parte Young* exception. While acknowledging that suits against state officials seeking prospective injunctive relief are typically available under *Ex parte Young*, the court held that such review was barred in this context based on its understanding of *Seminole Tribe*. PSCW Pet. App. 68a-73a. Before dismissing the case, however, the court requested further briefing on whether the PSCW was an indispensable

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[2] See *College Sav. Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999); *Florida Prepaid Postsecondary Educ. Expense Bd.* v. *College Sav. Bank*, 527 U.S. 627 (1999); *Alden* v. *Maine*, 527 U.S. 706 (1999).

party to suit under Rule 19(b) of the Federal Rules of Civil Procedure. *Id.* at 75a.

While the Wisconsin cases remained pending in district court, the Seventh Circuit issued its initial decision in the Illinois case and then granted rehearing in that case. See pp. 7-8, *supra*.

In the meantime, the district court in the Wisconsin cases held that, in light of *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999), the Seventh Circuit's decision in the Illinois case was no longer good law. PSCW Pet. App. 86a. The court stated that, although *College Savings Bank* preserved some implied waivers of sovereign immunity, the circumstances in which such waivers would be recognized were limited. *Id.* at 87a. The court also reiterated its conclusion that review under *Ex parte Young* was unavailable. *Id.* at 82a-84a. Having concluded that suit against the PSCW and its commissioners was barred by the Eleventh Amendment, the court held that the PSCW was an indispensable party within the meaning of Rule 19. *Id.* at 89a-93a. Accordingly, the court dismissed the case in its entirety.

3. In a decision addressing the appeals in the Wisconsin cases and the rehearing petitions in the Illinois cases, the Seventh Circuit held that the Eleventh Amendment does not preclude suits against a state public service commission or its members challenging its exercise of authority under the 1996 Act. PSCW Pet. App. 1a-48a. The court held that, "by deciding to exercise the power delegated to them by the Act, the states agreed to the conditions attached to that grant of power and thereby waived their Eleventh Amendment immunity from suit in federal court." *Id.* at 47a-48a. In the alternative, the court held that review of decisions

by state commissions was also available in an action against the individual commissioners under *Ex parte Young*, "[b]ecause the carriers have alleged ongoing violations of federal law and because they seek prospective equitable relief." *Id.* at 48a. Having found that the Eleventh Amendment posed no bar to suit against state commissions or commissioners, the Seventh Circuit had no occasion to address the question of whether the commissions or commissioners are indispensable parties to suit.

Before reaching the Eleventh Amendment issues, the Seventh Circuit held, as a threshold matter, that federal courts have jurisdiction under Section 252(e)(6) to review determinations by state public utility commissions. PSCW Pet. App. 25a-27a. Rejecting petitioners' arguments that the 1996 Act does not provide for suit against state commissions "but instead provides only for federal court review of the interconnection agreements themselves," the court explained that the text and structure of the Act made clear "that Congress contemplated suits against state defendants in federal court." *Id.* at 25a. Citing *Southwestern Bell Telephone Co.* v. *Public Utilities Commission*, 208 F.3d 475 (5th Cir. 2000), the court also held that Section 252(e)(6) confers jurisdiction on federal courts to review enforcement decisions by state commissions interpreting previously approved interconnection agreements, as well as decisions approving or rejecting such agreements in the first instance. PSCW Pet. App. 26a.

a. Turning to the Eleventh Amendment issues, the court of appeals held that the state public utility commissions waived their immunity in federal court from suits contending that their approval, rejection, interpretation, or enforcement of interconnection agreements violates federal law. The court reasoned that the

state commissions voluntarily accepted Congress's offer of federal regulatory authority under the 1996 Act—an offer that was clearly conditioned on the state commissions' agreement that they would be subject to suit in federal court arising from their exercise of that authority. PSCW Pet. App. 28a-40a.

First, the court of appeals considered whether Congress *could*, consistent with this Court's decisions, condition a grant of regulatory authority on a State's waiver of its Eleventh Amendment immunity. While recognizing that *College Savings Bank* overruled the "forced waiver" doctrine—under which a State was deemed to have waived its immunity merely by participating in activities governed by various federal statutes—the court noted that *College Savings Bank* "did not call into question other types of 'constructive' waivers obtained by Congress acting within its Article I powers." PSCW Pet. App. 30a. To the contrary, the court concluded that *College Savings Bank*, in citing two examples of waivers that Congress may still obtain from the States,[3] preserved Congress's authority to condition a "gratuity" to the States upon a waiver of immunity. *Id.* at 30a-31a.

Second, the court of appeals considered whether Congress *did*, with the requisite degree of clarity, condition the States' participation in the regulatory scheme established by the 1996 Act on a waiver of immunity. Rejecting petitioners' argument that Congress had to

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[3] The examples given in *College Savings Bank* concerned approval of an interstate compact conditioned upon a waiver of immunity, see *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and a grant of federal highway funds conditioned upon a higher state drinking age, see *South Dakota* v. *Dole*, 483 U.S. 203 (1987).

mention the Eleventh Amendment explicitly in order to create a valid condition, the court explained that the structure of Section 252 "makes clear that Congress intended to provide for federal court review of any regulatory determination made under the section, whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its place." PSCW Pet. App. 33a. Thus, the court concluded, "Congress has expressed unmistakably that, under the 1996 Telecommunications Act, states could participate in the federal regulatory function delegated to them by the federal government on the condition that their participation be reviewable in federal court." *Id.* at 34a.

Third, the court of appeals considered whether the States have, in fact, waived their Eleventh Amendment immunity under the 1996 Act. PSCW Pet. App. 34a. Citing the Tenth Circuit's recent decision in *MCI Telecommunications Corp.* v. *Public Service Commission*, 216 F.3d 929 (2000), petition for cert. pending, No. 00-593, the court held that "states have waived their Eleventh Amendment immunity by accepting the federal government's invitation to act as regulators of the local telephone market in accordance with § 252 of the 1996 Telecommunications Act." PSCW Pet. App. 35a.

In support of that conclusion, the court of appeals rejected petitioners' argument that the waiver obtained by the 1996 Act is "fundamentally different" from the waivers in the earlier cases discussed with approval in *College Savings Bank*. In response to petitioners' argument that those waivers were contained in enactments under Congress's Compact Power and Spending Power, while the 1996 Act rests upon Congress's Commerce Power, the court observed that the analysis

in *College Savings Bank* "did not hinge on whether Congress was acting within its Commerce or Spending or Compact Powers." PSCW Pet. App. 35a. The court explained that "the key in those cases was that Congress had the prerogative to bestow a gratuity and that, by accepting the gratuity, the states agreed to undertake certain actions that Congress could not otherwise have required them to take." *Id.* at 36a.[4]

The court of appeals determined that the state commissions' authority to regulate matters encompassed by the 1996 Act is a gratuity, because that authority is "derived from provisions of the Act and not from [the commissions'] own sovereign authority." PSCW Pet. App. 37a. The court observed that Congress "*could* determine that all regulation of the telecommunications industry ought to be entrusted to the federal government" and, in the 1996 Act, "Congress *did* take over some aspects" of local telecommunications regulation and "precluded all other regulation [of those aspects] except on its terms." *Id.* at 36a-37a. The court therefore concluded that, when state commissions engage in the regulation of local telecommunications in areas encompassed by the Act, they are not engaged in

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[4] In rejecting the argument that waivers under the 1996 Act "cannot be likened to the kind of waiver obtained by Congress in the exercise of its Spending Power," the court of appeals explained that "[t]he state commissions have entered into the same kind of exchange with Congress that takes place when Congress offers federal funds conditioned on a state's acceptance of the federal terms." PSCW Pet. App. 38a. Thus, the court noted, "[t]he only difference between the classic example of a Spending Clause gratuity of federal funds and the waivers in our cases is that, with the 1996 Telecommunications Act, Congress has offered the states, not federal funds, but a role as what the carriers have called a 'deputized' federal regulator." *Ibid.*

"otherwise permissible activity" as that term is used in *College Savings Bank*; the court explained that, "the states are not merely acting in an area regulated by Congress," but "are now voluntarily *regulating on behalf of Congress*." *Id.* at 37a, 40a. In such circumstances, the court concluded, Congress may offer such regulatory power to the States, attaching conditions to that offer if it sees fit, and "States are free to accept or reject the terms Congress has offered." *Id.* at 40a.[5]

b. As an "independent basis for decision," the court of appeals held that the Eleventh Amendment does not bar prospective injunctive relief against the individual members of the state commissions. PSCW Pet. App. 40a. The court agreed with decisions in the Sixth and Tenth Circuits holding that suits against state commissioners under the 1996 Act present a "straightforward" application of the *Ex parte Young* exception. *Id.* at 41a. The court concluded that, because the parties "seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law," the relief sought "is precisely the type contemplated by the *Ex parte Young* doctrine." *Id.* at 42a.

The court of appeals rejected petitioners' argument that *Seminole Tribe* "renders the *Ex parte Young* doctrine inapplicable" to suits against state commissioners under the 1996 Act. PSCW Pet. App. 42a. The court explained that "Congress has not limited the court's

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[5] The court of appeals noted that the one case before it involving a privately negotiated agreement had been dismissed, thereby obviating the need to decide "whether a state commission might have no true choice but to involve itself in the review process of a privately negotiated interconnection agreement in order to avoid the consequence of having the agreement be 'deemed approved' under 47 U.S.C. § 252(e)(4)." PSCW Pet. App. 39a n.11.

remedial power under subsection 252(e)(6) of the 1996 Telecommunications Act," as Congress did under the Indian Gaming Regulatory Act at issue in *Seminole Tribe*. *Id.* at 45a.

The court of appeals also concluded that allowing suit under *Ex parte Young* would not implicate "special sovereignty interests" in the manner identified as problematic in *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261 (1997). PSCW Pet. App. 45a-47a. Unlike the State's interest in real property in *Coeur d'Alene*, the court explained, "[i]n the wake of the 1996 Telecommunications Act," the States' interest in regulating matters encompassed by the Act "is derived solely from the regulatory role Congress has bestowed upon the states." *Id.* at 46a-47a

ARGUMENT

The Seventh Circuit's decision is correct and does not conflict with any decision of this Court or any other court of appeals. Indeed, to the extent that other courts of appeals have considered the question presented in this case, they have reached the same answer as did the Seventh Circuit. See *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000) (finding no Eleventh Amendment bar on both waiver and *Ex parte Young* grounds), petition for cert. pending, No. 00-593; *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862 (6th Cir.) (basing decision solely on *Ex parte Young*), cert. denied, 121 S. Ct. 54 (2000). This Court's review is therefore not warranted.

1. The court of appeals correctly held that state public utility commissions waived their immunity from suit in federal court by voluntarily accepting Congress's offer to exercise regulatory authority under the new scheme established by the 1996 Act to promote com-

petition in local telecommunications markets. The Act provides that a regulatory body will exercise authority, subject to review in federal court, over agreements between incumbent carriers and new entrants pursuant to the Act (*i.e.*, agreements concerning interconnection, access to network elements, resale of services, etc.). See 47 U.S.C. 251, 252. If that responsibility is undertaken by the FCC, pursuant to 47 U.S.C. 252(e)(5), the FCC's actions are reviewable in the federal courts of appeals, as provided in the Hobbs Act, 28 U.S.C. 2342 (1994 & Supp. IV 1998). If, in the alternative, a state commission accepts Congress's offer of regulatory authority under the Act, the state commission does so with full knowledge that the Act permits aggrieved parties to seek "[r]eview of State commission actions" in federal district court. 47 U.S.C. 252(e)(6). Thus, the Act clearly puts the state commissions on notice that, if they elect to participate in the federal regulatory scheme, they will do so subject to review of their actions in federal court.[6]

The Seventh Circuit's decision that States waive their Eleventh Amendment immunity by assuming a regulatory role under the 1996 Act is fully consistent with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Education Expense Board*, 527 U.S. 666 (1999). *College Savings Bank* does not suggest that Congress cannot condition a State's exercise of regulatory authority under a federal statute—authority that would otherwise be exercised by a federal agency, subject to review in federal court—on the State's amenability to federal court

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[6] Petitioners do not contend that the 1996 Act lacks sufficient clarity to put state public utility commissions on notice that their actions will be reviewed in federal court.

review of its exercise of that regulatory authority. To the contrary, *College Savings Bank* confirms that Congress's ability to impose conditions on a State's voluntary exercise of federal authority is wholly distinct from a forced waiver under the now-overruled doctrine of *Parden* v. *Terminal Railway of the Alabama State Docks Department*, 377 U.S. 184 (1964). See 527 U.S. at 675-687.[7]

College Savings Bank makes clear, as the Seventh Circuit and other courts of appeals have recognized,[8]

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[7] The *Parden* doctrine applied when a State took part, as would a private party, in federally regulated activity and thereby became subject to controlling federal law. Thus, under the *Parden* doctrine, States that engaged in enterprises governed by federal statutes—such as the Lanham Act or the Patent Act—might be thought to have consented voluntarily to suit under those statutes. As Justice Scalia suggested as early as his dissent in *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 41-45 (1989) (Scalia, J., dissenting in part), *Parden* waivers accomplished the same result as a federal abrogation of state immunity for actions in a regulated area. Accordingly, once the Court overruled *Union Gas*, in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), and declared Congress without authority to abrogate state immunity under its Article I powers, the *Parden* doctrine lost vitality. As the Court explained in *College Savings Bank*, "[f]orced waiver and abrogation are not even different sides of the same coin—they are the same side of the same coin." 527 U.S. at 683. Accordingly, because Congress could not abrogate a State's immunity for violations of the Lanham Act, neither would a State be held to have impliedly waived its immunity by engaging in conduct subject to that Act.

[8] See *Sandoval* v. *Hagan*, 197 F.3d 484, 494 (11th Cir. 1999) (finding waiver of immunity based on acceptance of federal funds), cert. granted on other grounds *sub nom. Alexander* v. *Sandoval*, 121 S. Ct. 28 (2000); *Litman* v. *George Mason Univ.*, 186 F.3d 544, 556 (4th Cir. 1999) (same), cert. denied, 120 S. Ct. 1220 (2000); *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281 (10th Cir. 1999) (same), cert. denied, 120 S. Ct. 1530 (2000).

that a State may impliedly waive its immunity in certain contexts. In particular, the Court reaffirmed its holding in *Petty* v. *Tennessee-Missouri Bridge Commission*, 359 U.S. 275 (1959), that "a bistate commission which had been created pursuant to an interstate compact * * * had consented to suit by reason of a suability provision attached to the congressional approval of the compact." *College Sav. Bank*, 527 U.S. at 686. The Court explained that, in *Petty*, Congress was simply imposing a condition on a grant of authority that the State would not otherwise possess, because interstate compacts cannot be formed without congressional approval. *Ibid.* Thus, the Court observed, Congress's action in *Petty* was a "gratuity" in the same sense as a disbursement of federal funds, a context in which it is well established that Congress may condition state participation on a waiver of immunity. *Id.* at 686-687 (citing *South Dakota* v. *Dole*, 483 U.S. 203 (1987)).

As in *Petty* and *Dole*, this case involves a condition imposed on a "gratuity"—which a State may freely choose to accept or reject—analogous to the conditional grant of congressional approval of the interstate compact in *Petty*. As the Court noted in *AT&T* v. *Iowa Utilities Board*, 525 U.S. 366 (1999), "[w]ith regard to the matters addressed by the 1996 Act," Congress "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 379 n.6. Congress allowed the States, through their public utility commissions, to play a role in that regulation, but only if they agreed to be subject to federal judicial review to ensure compliance with the new federal standards. Thus, with respect to the core local competition obligations imposed by Sections 251 and 252, the Act does not allow the States simply "to do

their own thing," and, "if the federal courts believe a state commission is not regulating in accordance with federal policy they may bring it to heel." *Ibid.*[9]

Petitioners contend that state commissions cannot be deemed to have waived their Eleventh Amendment immunity, because the authority to regulate interconnection agreements cannot properly be viewed as a "gratuity" within the meaning of *College Savings Bank*. Unlike the "fundamentally consensual" waivers in *Petty* and *Dole*, petitioners argue (PSCW Pet. 17), the issue here is "whether a state's existing, un-preempted police power presence in local telecommunications competition could lead to the wavier of Eleventh Amendment immunity." Petitioners' characterization of the state commissions' regulatory role reflects a fundamental misunderstanding of changes wrought by the 1996 Act. As the court of appeals recognized (PSCW Pet. App. 36a), Congress could—and did—take over certain aspects of local telecommunications regulation from the States. Far from preserving the status quo, the Act imposed a new federal regulatory scheme on local telecommunications markets; the States were permitted to continue to regulate in areas encompassed by the Act only to the extent consistent with the Act and

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[9] The question whether the Eleventh Amendment protects States from suit under the 1996 Act was not at issue in *Iowa Utilities Board*. Nor is that question presented in the five pending petitions for a writ of certiorari arising from the Eighth Circuit's decision on remand in *Iowa Utilities Board*. Those petitions instead involve the rules promulgated by the FCC to implement the substantive requirements of Section 251(c). See *Verizon Communications, Inc.* v. *FCC* (No. 00-511); *WorldCom, Inc.* v. *Verizon Communications, Inc.* (No. 00-555); *FCC* v. *Iowa Utils. Bd.* (No. 00-587); *AT&T* v. *Iowa Utils. Bd.* (No. 00-590); *General Communications, Inc.* v. *Iowa Utils. Bd.* (No. 00-602).

implementing FCC regulations. See *Iowa Utils. Bd.*, 525 U.S. at 379 n.6. The Act thus reflects the general principle that Congress may preempt the States from regulating in an area of federal concern and may condition the States' continued regulation in that area on adherence to provisions of federal law. See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981).[10]

Based upon their flawed conception of state commissions' regulatory authority after the 1996 Act, petitioners also assert that this case implicates a circuit split. But the principal cases that petitioners rely upon to support that assertion (see PSCW Pet. 18) stand only for the unexceptional proposition that a State's "mere presence" in a federally regulated area cannot be construed as a waiver of immunity. See *Burnette* v. *Carothers*, 192 F.3d 52, 60 (2d Cir. 1999) (State did not impliedly waive its sovereign immunity by engaging in activity subject to federal environmental statutes), cert. denied, No. 00-610 (Dec. 11, 2000); *Chavez* v. *Arte Publico Press*, 204 F.3d 601, 603 (5th Cir. 2000) (State

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[10] To be sure, while Congress has "taken the regulation of local telecommunications competition away from the States" with respect to "matters addressed by the 1996 Act," *Iowa Utils. Bd.*, 525 U.S. at 379 n.6, Congress has not taken over the regulation of all aspects of local telecommunications. And Congress preserved the ability of the States to supplement federal requirements with requirements of their own, so long as they are consistent with the Act and any rules promulgated thereunder by the FCC. See 47 U.S.C. 251(d)(3), 261(b) and (c). Contrary to petitioners' assertions (see, *e.g.*, PSCW Pet. 15, ICC Pet. 16-18), however, the fact that Congress did not supplant state regulation in every possible respect does not undermine the court of appeals' waiver analysis; the court held that the States waived their sovereign immunity from suit in federal court only with respect to those matters as to which Congress *has* supplanted state regulation.

did not impliedly waive its sovereign immunity by engaging in activity subject to federal copyright and trademark statutes). Those cases do not involve the 1996 Act or the regulation of local telecommunication markets. Nor do those cases address the question whether a State waives its immunity when it exercises substantial *new* regulatory authority conferred by Congress with conditions clearly attached.[11]

In sum, it is the 1996 Act, not state law, that provides new entrants with the core rights to interconnect with an incumbent carrier's network, to lease elements of the incumbent's network, and to purchase services of the incumbent's network for resale. It is the 1996 Act, not state law, that provides for incumbents and new entrants to enter into agreements implementing those rights, either through negotiation between themselves or through arbitration under the auspices of a regulatory body. It is the 1996 Act, and the regulations promulgated by the FCC under that Act, that contain the basic principles governing the rates, terms, and conditions in such agreements. Thus, the regulation of interconnection agreements, as creatures of federal law, is not an "otherwise permissible activity" under *College Savings Bank*. Instead, such regulation is akin

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[11] Petitioners' reliance on *GTE North, Inc.* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), is equally unavailing. Although the Sixth Circuit stated in a footnote in *GTE North* that the 1996 Act "cannot legitimately be construed as a valid waiver of sovereign immunity," *Id.* at 922 n.6, the court's mention of waiver was dicta. The Sixth Circuit recognized that the case could proceed against the state commissioners on *Ex parte Young* grounds. *Id.* at 922 & n.6. No waiver theory was briefed or argued in that case because the district court's jurisdiction over the preemption claim there was based solely on 28 U.S.C. 1331, not on Section 252(e)(6).

to a "gratuity" that Congress may offer with conditions attached. States remain free to accept or reject the regulatory role that Congress has offered to them under the Act. But States cannot choose to participate in the regulatory scheme established under the Act while simultaneously rejecting the federal judicial review that is a critical part of the regulatory scheme.[12]

2. The Seventh Circuit's explicitly "independent basis for decision" (PSCW Pet. App. 40a)—that the *Ex parte Young* exception to the doctrine of sovereign immunity permits suit for prospective relief against the commissioners of the PSCW and the ICC—is also correct and in accord with the decisions of the only courts of appeals that have addressed the issue. See *MCI Telecomms.*, 216 F.3d at 939; *Michigan Bell*, 202 F.3d at 867. Indeed, this Court has denied petitions for certiorari in two cases raising the precise arguments against *Ex parte Young* review that petitioners present here. See *Strand* v. *Michigan Bell Tel.*, 121 S. Ct. 54 (2000) (No. 99-1878); *Strand* v. *Verizon North Inc.*, 121 S. Ct. 380 (2000) (No. 00-101). No different result is warranted in this case.

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[12] Petitioners' argument (PSCW Pet. 19-23) that state commissions have no meaningful "choice" under the Act, but instead are "coerced" to regulate in violation of the Tenth Amendment, is not suitable for this Court's review. None of the courts below addressed that question. Cf. *Michigan Bell*, 202 F.3d at 866 (holding that the 1996 Act does not "compel" actions by state commissions in violation of the Tenth Amendment). In any event, as the foregoing discussion illustrates, state commissions do have a meaningful "opt-out" option under the Act. Indeed, at least one state commission has declined to exercise regulatory authority in this context. See *In re Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, CC Docket No. 00-52 (FCC June 14, 2000).

This Court has recognized that the doctrine of sovereign immunity reflected in the Eleventh Amendment does not preclude an action that seeks injunctive relief against individual state officials to assure their prospective compliance with federal law. See *Ex parte Young*, 209 U.S. 123 (1908); see also *Pennhurst State Sch. & Hosp.* v. *Halderman* (*Pennhurst II*), 465 U.S. 89, 102 (1984); *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997) (acknowledging "the continuing validity of the *Ex parte Young* doctrine"). As the Court has observed, the *Ex parte Young* exception to state sovereign immunity is "necessary to permit the federal courts to vindicate federal rights and hold state officials responsible to the supreme authority of the United States." *Pennhurst II*, 465 U.S. at 105 (internal quotation marks omitted); accord *Alden* v. *Maine*, 527 U.S. 706, 747-748 (1999).[13]

The court of appeals correctly held that the suits consolidated here "fit squarely within the traditional framework of *Ex parte Young*." PSCW Pet. App. 42a. In naming the commissioners of the PSCW and the ICC as parties in suits seeking review of those commissions' determinations under Section 252(e)(6), the parties are seeking "to have the commissioners conform their future actions, including their continuing enforcement

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[13] Contrary to petitioners' assertions (ICC Pet. 23-27), the *Ex parte Young* exception is not limited to suits alleging *constitutional* violations. The exception applies equally where the state official's conduct is alleged to violate a federal statute. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 156 & n.6 (1978); see also *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (presupposing same). Indeed, if petitioners' assertion were correct, *Seminole Tribe* and *Coeur d'Alene Tribe*, neither of which alleged any federal constitutional violation, could have been disposed of on much simpler grounds.

of the challenged determinations, with federal law." *Ibid.* That is the precise circumstance in which the *Ex parte Young* exception is appropriately employed. See *Coeur d'Alene Tribe*, 521 U.S. at 276-277 (opinion of Kennedy, J.) (observing that *Ex parte Young* and its progeny teach "that where prospective relief is sought against individual state officers in a federal forum based on a federal right, the Eleventh Amendment, in most cases, is not a bar").[14]

Petitioners argue principally (PSCW Pet. 27-29) that the *Ex parte Young* exception is improper in this case under *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996).[15] But *Seminole Tribe* involved what the Court described as a "carefully crafted and intricate remedial scheme" that made only a "modest set of sanctions" available to aggrieved parties in federal court. *Id.* at 73-75. Here, in contrast, Congress did not similarly restrict the remedies available in federal court to parties aggrieved by actions of state commissions under the 1996 Act.

In *Seminole Tribe*, this Court reviewed provisions of the Indian Gaming Regulatory Act (IGRA), Pub. L. No.

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[14] Seven of the nine Justices in *Coeur d'Alene Tribe* reaffirmed that the inquiry governing whether *Ex parte Young* relief is available against state officials is "whether a complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." 521 U.S. at 296 (O'Connor, J., concurring); *id.* at 298 (Souter, J., dissenting).

[15] Petitioners also assert (PSCW Pet. 27, ICC Pet. 28-29) that the *Ex parte Young* exception is unavailable in this case, because the plaintiff carriers are not seeking prospective relief against the commissioners. The court of appeals correctly rejected the premise of petitioners' argument. As the court noted, "[t]he challenged determinations are still in place, and the carriers seek to have the commissioners conform their future actions, including their continuing enforcement of the challenged determinations, with federal law." PSCW Pet. App. 42a.

100-497, 102 Stat. 2467, that established a framework for States to negotiate compacts with Indian Tribes. Under IGRA, the only judicial remedy for a State's failure to negotiate in good faith was an order directing the State to conclude a compact within 60 days; the only judicial remedy for a State's failure to conclude a compact within 60 days was an order requiring each party to submit its own proposed compact to a mediator; and the only judicial remedy for a State's refusal to accept the compact selected by the mediator was a notice to the Secretary of the Interior, who would then prescribe regulations. *Seminole Tribe*, 517 U.S. at 74. The Court reasoned that "[b]y contrast with this quite modest set of sanctions" that Congress in IGRA had authorized federal courts to provide, "an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court." *Id.* at 75. The Court therefore held that the Tribes could not seek to enforce their IGRA rights in actions against state officials under *Ex parte Young*, because such actions would enable the Tribes to obtain more expansive remedies than Congress intended to provide in IGRA. *Id.* at 74-76.[16]

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[16] As noted in the text, the Court's focus in *Seminole Tribe* was on the "carefully crafted and intricate" statutory scheme governing the remedies available once the dispute reached federal court. The Court concluded that, because Congress had specified only a "modest set of sanctions" to be imposed by the court, Congress did not intend that additional remedies be available under *Ex parte Young*. See 517 U.S. at 74-76. That reasoning does not apply where, as under the 1996 Act, Congress has not restricted the remedies available in federal court. It is thus irrelevant whether the regulatory process, which precedes the judicial process provided for under the Act, might itself be characterized as "carefully crafted and intricate."

There is no reason similarly to conclude that an injunction under *Ex parte Young* would sweep more broadly than Congress intended in enacting the 1996 Act. In contrast to the statute in *Seminole Tribe*, the 1996 Act does not narrowly circumscribe the remedies available in federal court to parties challenging the orders of state public utility commissions with respect to interconnection agreements. The Act provides for a process of negotiation between the parties, followed by arbitration, if necessary, by the state commission, and state commission review of the ultimate agreement. See 47 U.S.C. 252(a)-(e)(5). Once an agreement is approved or rejected by the state commission, federal court review is available "to determine whether the agreement or statement meets the requirements" of the Act. 47 U.S.C. 252(e)(6). An action under *Ex parte Young* is thus fully consistent with the remedy contemplated by Congress. It does not expand the remedies or scope of judicial review available under the Act.

Finally, petitioners contend (PSCW Pet. 30) that the *Ex parte Young* exception is inapplicable because "state court review remains available to compel correction of an erroneous state commission action." To the extent review is sought for decisions by state commissions "approving or rejecting an agreement," however, state courts are expressly divested of jurisdiction under the Act. 47 U.S.C. 252(e)(4). Moreover, even in those circumstances where state court review is not expressly precluded—as where a state commission interprets or enforces provisions in an existing interconnection agreement—the availability of such review does not affect the applicability of *Ex parte Young*. Indeed, the premise of *Ex parte Young* is that, regardless of possible remedies in state court, "[r]emedies designed to end a continuing violation of federal law are

necessary to vindicate the federal interest in assuring the supremacy of the law." *Papasan* v. *Allain*, 478 U.S. 265, 278 (1986). Thus, the court of appeals correctly held here that *Ex parte Young* provides an independent basis for suit against individual state public utility commissioners to obtain review of their actions under the 1996 Act.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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No. 00-653

In the Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.,

Petitioners,

v.

WISCONSIN BELL, INC. D/B/A AMERITECH WISCONSIN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state commission's acceptance of Congress's invitation to participate in implementing a federal regulatory scheme that provides that state commission determinations are reviewable in federal court constitutes a waiver of Eleventh Amendment immunity.

2. Whether Congress's decision to permit state public utility commissions to perform certain voluntary federal regulatory functions under a federal statutory scheme, subject to review in federal court, is permissible under the Tenth Amendment.

3. Whether state commission determinations relating to the enforcement of previously-approved section 252 interconnection agreements are reviewable in federal court under 47 U.S.C. § 252(e)(6).

4. Whether an official capacity action seeking prospective relief against state public utility commissioners for alleged ongoing violations of federal law in performing federal regulatory functions under the federal Telecommunications Act of 1996 can be maintained under the *Ex parte Young* doctrine.

RULE 29.6 STATEMENT

Respondent Wisconsin Bell, Inc. d/b/a Ameritech Wisconsin ("Ameritech") is a wholly owned subsidiary of Ameritech Corporation, which is in turn a wholly owned subsidiary of SBC Communications, Inc., a publicly held corporation that provides services to the public only through its operating subsidiaries. No publicly held company owns 10% or more of the stock of SBC Communications, Inc.

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BRIEF FOR WISCONSIN BELL, INC. d/b/a AMERITECH WISCONSIN IN OPPOSITION

STATEMENT

A. The Telecommunications Act of 1996. These cases arise under the federal Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (codified at 47 U.S.C. § 151 *et seq.*) ("the 1996 Act" or "the Act"). As this Court recognized last year, the 1996 Act establishes a "new federal regime" that "fundamentally restructures local telephone markets" and thus "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 371, 378 n.6, 397 (1999). Under this new regime, Congress vested the Federal Communications Commission ("FCC") with broad authority to make general rules and regulations for implementing the new federal substantive standards created by the Act. *Id.* at 377-78 & n.5; see also 47 U.S.C. § 201(b). As Justice Scalia's opinion for the Court explained, "[w]ith regard to the matters addressed by the 1996 Act," the federal government "unquestionably" has "taken the regulation of local telecommunications competition away from the States." *Id.* at 378 n.6. At the same time, Congress established a new, voluntary role for state regulators to help administer the Act. If the state regulators choose to discharge their delegated responsibilities under the Act, their actions are reviewable in federal court. 47 U.S.C. § 252(e)(6) & (4). If the state regulators decline the regulatory role offered to them by Congress, the FCC must assume that role. 47 U.S.C. § 252(e)(5).

B. Interconnection Agreements and Statements of Generally Accepted Terms The "key provisions by which Congress sought to open local telecommunications markets to competition are 47 U.S.C. §§ 251 and 252." *Pacific Bell* v. *Cook Telecom, Inc.*, 197 F.3d 1236, 1237 (9th Cir. 1999). Most significantly, sections 251 and 252 of the Act govern the

formation and content of "interconnection agreements," which are the federally-mandated means of implementing the local competition provisions of the Act. Notwithstanding their nomenclature, interconnection "agreements" are nothing like private commercial contracts. If private parties are unable to reach agreement after arms-length negotiations, they simply can walk away from the bargaining table. Under the Act, however, Congress has (i) compelled incumbent local exchange carriers ("LECs") to enter into "agreements" that permit competitors to obtain access to incumbent LEC networks at cost-based rates, and (ii) subjected incumbent LECs to "a host of duties intended to facilitate market entry" by competing LECs. *AT&T Corp.*, 525 U.S. at 371.

Upon receiving a request for interconnection from a competing LEC, an incumbent LEC, like Ameritech, "may negotiate and enter into a binding agreement" with the requesting carrier. 47 U.S.C. § 252(a)(1). If, however, the incumbent LEC does not agree to include in its interconnection agreement what a competing carrier believes to be statutory or regulatory requirements, that carrier has a right to ask a state commission (or the FCC, if the state commission fails to act) to compel the incumbent to include those purported requirements in a so-called "agreement." An incumbent LEC may not escape the obligation to enter into section 252 agreements, even if such agreements would be illegal under state law. Moreover, under section 252(i) of the Act, the terms and conditions that are incorporated into a particular agreement must be made available to any other carrier that requests them. 47 U.S.C. § 252(i). In short, the Act sets forth a detailed substantive and procedural framework for imposing a web of *federal* statutory and regulatory obligations on incumbent LECs, and section 252 interconnection "agreements" are the regulatory vehicles for implementing this Congressional compulsion.

The section 252 process essentially involves four steps: (i) negotiation, (ii) arbitration, (iii) approval (or rejection), and (iv) judicial review. At every stage of the process, federal law sets the pertinent standards. To begin the process, a competing LEC asks to negotiate an interconnection agreement with the incumbent LEC. 47 U.S.C. § 252(a)(1). The parties may reach an agreement through negotiations alone. *Id.* Alternatively, either party may file a petition with the state utility commission for arbitration of "any open issues" regarding the interconnection agreement. 47 U.S.C. § 252(b)(1). In conducting section 252 arbitrations, the state regulators are authorized to "impos[e] appropriate conditions as required to implement [section 252(c)]," provided that any conditions they impose comply with section 251 and the FCC's rules implementing it. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1); see also *AT&T Corp.*, 525 U.S. at 373 (noting that section 252 arbitrations are "subject to § 251 and the FCC regulations promulgated thereunder"). Although a state commission may impose the requirements of the Act upon an incumbent when the parties do not agree what those requirements are (47 U.S.C. § 252(b)), the commission has no authority to alter the obligations prescribed by a previously-approved "binding" agreement, *id.* § 252(a)(1).

Once the parties reach an agreement, whether through arbitration or negotiation, they must submit the agreement to the state commission for approval. 47 U.S.C. § 252(e)(1). The state commission then must determine whether to approve or reject the agreement, applying the standards set forth in the Act. 47 U.S.C. § 252(e)(2). And any post-approval "dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" also lies within "the states' 'responsibility' under section 252" of the Act. *In the Matter of Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission*

Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, FCC No. 00-216, ¶ 6 (rel. June 14, 2000) ("*Starpower*").

When the incumbent LEC is a Bell Operating Company, as Ameritech is here, it may file a "statement of generally available terms" ("SGAT"), which is a statement of the terms that it will make available to all competing carriers in a state. 47 U.S.C. § 252(f)(1). As with an interconnection agreement, such a statement must be submitted to the state commission for approval. 47 U.S.C. § 252(f)(2).

C. Judicial Review and FCC Preemption of State Commission Inaction. Although the Act does not require state regulators to participate in the new federal scheme for the regulation of private telecommunications carriers, those state regulators who choose to participate are not simply "allowed to do their own thing" (*AT&T Corp.*, 525 U.S. at 378 n.6); rather, they "must hew" to the lines drawn by the Act, the federal courts, and the FCC. *Id.* The mechanism for ensuring that state regulators do so is 47 U.S.C. § 252(e)(6). After the state regulators make a determination with respect to the rights and obligations of the parties, section 252(e)(6) authorizes "any party aggrieved" by that "determination" to bring an action in "Federal district court" to determine whether the state regulators have met "the requirements of" sections 251 and 252.

Because Congress may not commandeer state commission participation in the Act's federal regulatory scheme, the Act provides a parallel regulatory scheme pursuant to which the Federal Communications Commission ("FCC") performs the prescribed regulatory tasks in the place of non-participating state regulators. If state regulators choose not to accept their "role" as "deputized federal regulator[s]" (Pet. App. 38a), the Act mandates that the FCC "shall issue an order preempting the

State commission's jurisdiction" of the proceeding in question, and "shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State commission." 47 U.S.C. § 252(e)(5). The FCC's obligation to stand in the shoes of non-participating state regulators extends to every regulatory task under section 252, including the interpretation and enforcement of disputed terms of an agreement. *Starpower*, ¶¶ 6-9 (concluding that state commission failed to perform its authorized section 252 function and preempting state commission jurisdiction over a dispute regarding the proper interpretation of the terms of a section 252 agreement). And like state commission "determinations under section 252," FCC determinations are subject to exclusive federal judicial review (47 U.S.C. § 252(e)(6)) in the federal courts of appeals under the Hobbs Act (47 U.S.C. § 402(a); 28 U.S.C. § 2342).

Federal judicial review of determinations relating to section 252 agreements, whether those determinations are made by a state commission or by the FCC, obviously is a crucial feature of the post-Act regime. As this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves national uniformity in the implementation of federal telecommunications law through section 252 agreements, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6.

D. The Proceedings Below. As petitioners note (at 2), the four state commission proceedings that form the basis for this appeal involve three types of state commission action. In two of the cases, petitioners made section 252 determinations in

arbitrating and approving a single interconnection agreement between Ameritech and MCI. Both parties to the agreement sought review of petitioners' determinations in that proceeding by filing an action in federal district court pursuant to section 252(e)(6) of the Act. The district court consolidated those two suits, and the United States intervened. The third district court case involved a challenge by Ameritech to petitioners' determinations in interpreting and enforcing two previously-approved interconnection agreements between Ameritech and TCG and between Ameritech and Time Warner. The fourth district court case concerned a challenge to petitioners' determinations regarding Ameritech's statement of generally available terms and conditions.

In each of the four cases, petitioners filed motions to dismiss under the Eleventh Amendment. The district court granted petitioners' motions in a single opinion disposing of all four cases. The court first concluded that petitioners had not waived the state's Eleventh Amendment immunity through their participation in the new federal regulatory scheme under the Act. Pet. App. 82a, 85a-88a; see also *id.* at 59a-67a. The court also ruled that the individual commissioners of the PSCW could not be sued in their individual capacities under the *Ex parte Young* doctrine. *Id.* at 82a-85a; see also *id.* at 68a-73a. In view of its conclusions on waiver and *Ex parte Young*, the court dismissed all of the petitioners — both the state commission and its invididual commissioners. *Id.* at 94a.

The Seventh Circuit reversed, holding that "the Eleventh Amendment does not bar these suits against the state commissions and their commissioners" for two "independent" reasons. Pet. App. 6a.[1] First, the court held that "in the

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[1] The Seventh Circuit consolidated the appeal from the district court's decision on the four Wisconsin cases at issue here with a related matter in which the Illinois Commerce Commission and its

particular circumstances present in these cases, the states have waived their Eleventh Amendment immunity by participating in the regulatory scheme created by the Act." *Id.* Second, the court held that "the carriers may proceed with their respective federal claims for equitable relief against the individual commissioners under the *Ex parte Young* doctrine." *Id.* In reaching its conclusion on waiver, the Seventh Circuit expressly relied (Pet. App. 28a-40a) on this Court's decisions in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999), *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987). The court also noted its agreement (Pet. App. 35a-37a & n.8) with the Tenth Circuit's waiver analysis and holding in *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929 (10th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). With respect to the applicability of *Ex parte Young*, the Seventh Circuit "agree[d] with the Sixth and Tenth Circuits that these suits are 'straightforward' *Ex parte Young* cases" (Pet. App. 41a), and squarely rejected (*id.* at 42a-47a) petitioners' contentions that this Court's decisions in *Seminole Tribe* and *Coeur d'Alene Tribe* required a contrary result.

Commissioners brought an interlocutory appeal from of an Illinois district court decision in which the court rejected an Eleventh Amendment defense. The Illinois Commission and Commissioners also have filed a petition for a writ of certiorari, No. 00-744, in which they seek review of the Seventh Circuit decision below.

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SEVENTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT OR ANY COURT OF APPEALS.

A. Petitioners first contend that the Seventh Circuit's holding that the Wisconsin commission's participation in the federal regulatory scheme set forth in the Act constitutes a waiver of Eleventh Amendment immunity conflicts with this Court's decision in *College Savings Bank* v. *Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666 (1999). This contention misreads both *College Savings* and the Act.

In *College Savings*, this Court reaffirmed the long established principle that a state may waive its Eleventh Amendment immunity by consenting to suit. 527 U.S. at 675-76. *College Savings* also confirmed that a state can manifest its consent to suit by accepting the benefits of a federal program that Congress has clearly conditioned on waiver of Eleventh Amendment immunity, provided that (i) the benefit could only be given by Congress, (ii) Congress is free to grant or withhold it, and (iii) the state is free to accept or reject it. *Id.* at 676, 678 n.2, 686-87; see also *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) (noting that Congress does not "lack the authority or means to seek the States' voluntary consent to private suits"). At the same time, the Court made clear that a state does not waive its Eleventh Amendment immunity by simply engaging in "otherwise permissible activity" that happens to be subject to federal regulation. *College Savings*, 527 U.S. at 687.

This Court illustrated through reference to its prior decisions the critical distinction between an invitation to waive immunity on the basis of a state's voluntary acceptance of a federal gratuity (which is permissible) and compulsion to waive immunity as a "sanction" for a state's participation in

"otherwise permissible activity" (which is unconstitutional). The Court first discussed (and overruled) its decision in *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), which had held that a state waives its Eleventh Amendment immunity simply by engaging in commercial activity that is subject to federal regulation. That decision, the Court concluded, was no longer tenable in light of *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996), in which the Court held that Congress could not use its Article I powers to abrogate unilaterally a state's Eleventh Amendment immunity. Because "a congressional power to exact constructive waivers of sovereign immunity * * * would * * *, as a practical matter, permit Congress to circumvent the antiabrogation holding of *Seminole Tribe*," the Court overruled *Parden*. *College Savings*, 527 U.S. at 683. And because the statute at issue in *College Savings* subjected the states to suits for damages in federal court under the Lanham Act on the basis of the state's marketing of investment products — an "otherwise permissible activity" — the Court held that the state had not voluntarily waived its Eleventh Amendment immunity. *Id.* at 687, 691. In sum, *College Savings* held that Congress cannot make consent to suit a precondition for a state to engage in "otherwise permissible activity," because exclusion of a state from such activity is a "sanction" that "coerces" a state into consenting to suit.

At the same time, however, this Court in *College Savings* reaffirmed its holdings in *Petty* v. *Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275 (1959), and *South Dakota* v. *Dole*, 483 U.S. 203 (1987), which together establish that Congress is free to condition a grant of money or authority that a state would not otherwise possess on the state's consent to suit in federal court. As the Court explained, conditions attached to a grant of federal authority (as in *Petty*) or federal funds (as in *Dole*) "are simply not analogous to *Parden*-style conditions attached to a State's decision to engage in otherwise lawful commercial activity."

College Savings, 527 U.S. at 678 n.2. For example, the condition attached by Congress as the price for its approval of the interstate compact at issue in *Petty* gave rise to a valid waiver upon acceptance of the condition by the state because "States cannot form an interstate compact without first obtaining the express consent of Congress; the granting of such consent is a gratuity." *Id.* at 686. See also *Innes* v. *Kansas State Univ.*, 184 F.3d 1275, 1281, 1284 (10th Cir. 1999) (holding in post-*College Savings* case that state "knowingly and voluntarily waived its Eleventh Amendment immunity" because state agency "consent[ed] to participate in a federal program and to follow the conditions thereof, including participation in certain federal bankruptcy functions, [which] is closely analogous to the waiver found in a state's acceptance of conditioned federal funds"), cert. denied, 120 S. Ct. 1530 (2000).

B. The fundamental error in petitioners' waiver argument is their failure to recognize that the waiver solicited by Congress under the Act falls plainly on the *Petty* and *Dole* side of the line, not on the *Parden* and *College Savings* side.

Notably, petitioners do not question the broad scope of Congress' authority, under the Commerce Clause, to enact legislation regulating local telephone competition. Nor could they. See *FERC* v. *Mississippi*, 456 U.S. 742, 764 (1982) ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). In the present context, Congress has exercised its authority under the Commerce Clause to enact a comprehensive federal legislative scheme governing certain aspects of local telecommunication competition. The states "unquestionably" have been preempted in those areas (*AT&T Corp.*, 525 U.S. at 378 n.6), and therefore they have no right to participate in the regulation of those areas under the new federal scheme. Congress, in its sole discretion,

could have decided that the federal statutory scheme would be implemented exclusively by federal regulators.

Accordingly, administration of the 1996 Act's local competition provisions — including those relating to the arbitration, approval or rejection, and enforcement of interconnection agreements and to the approval or rejection of statements of generally available terms — is not an "otherwise permissible activity" in which a state may engage without Congress's permission. Rather, it is a wholly new activity, the terms and conditions of which were established by Congress to impose new obligations on incumbent LECs that are intended to foster a pro-competitive, de-regulatory national policy. It is solely within Congress's purview to determine whether and to what extent state regulators should be involved in the administration of the Act's federal regulatory program. As with the formation of an interstate compact, participating in the administration of a federal regulatory program as a deputized federal regulator is something that states cannot do "without first obtaining the express consent of Congress," and therefore "the granting of such consent is a gratuity." *College Savings*, 527 U.S. at 686.

Here, of course, Congress has chosen to offer the states a role in the administration of the "new federal regime." *AT&T Corp.*, 525 U.S. at 378 n.6. Among other things, states are invited, through their public utility commissions, to participate in the arbitration, approval, and enforcement of interconnection agreements between incumbent and competing LECs. Congress also made clear that if a state chooses to accept the invitation to serve as deputy federal regulators, it must consent to review of its actions in federal court. 47 U.S.C. §§ 252(e)(4) & (6). The imposition of this condition makes eminent sense, for as this Court has observed, "a federal program administered by 50 independent state agencies is surpassing strange." *AT&T Corp.*, 525 U.S. at 378 n.6. Section 252(e)(6) preserves

national uniformity in the implementation of the 1996 Act, notwithstanding the involvement of state regulators in implementing that law. Under section 252(e)(6), if state officials are "not regulating in accordance with federal policy," there is "no doubt" that the "federal courts * * * may bring [them] to heel" by "draw[ing] the lines to which they must hew." *AT&T Corp.*, 525 U.S. at 378 n.6. And, finally, the Act does not compel a state commission to implement the Act's provisions. The states clearly retain the right to decline Congress's invitation. 47 U.S.C. § 252(e)(5). If a state does decline Congress's invitation, the Act merely provides that the FCC will step into the shoes of the non-participating state regulators, applying the same federal standards, again subject to federal judicial review. *Id.*

The 1996 Act presents states and their officials with the same sort of choice that this Court approved in *Petty* and *Dole* and again endorsed in *College Savings*. The opportunity to participate *as a regulator* in the implementation of a federal statute — an activity that did not preexist the 1996 Act and that Congress could have reserved exclusively to the federal government — is a far cry from engaging *as a regulated entity* in an "otherwise permissible activity." When a state operates a savings plan or runs a railroad, that activity ordinarily does not implicate unique federal interests. By contrast, when a state voluntarily acts as a deputized federal regulator, Congress has a special interest in ensuring that the state officials' actions conform to uniform federal standards. That is precisely what Congress intended to accomplish through its conditional invitation to the states under the Act, and any state that accepts Congress's invitation cannot escape the consequences of its voluntary action.[2]

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[2] Petitioners' do not (and cannot) cite a single case in which a court has held that the Act does not make sufficiently clear that the

C. As demonstrated above, the Seventh Circuit's decision does not conflict in any way with this Court's decision in *College Savings*. Indeed, as the Seventh Circuit carefully explained, its decision follows inexorably from this Court's reaffirmation of *Petty* and *Dole*. Moreover, the only other court of appeals to have decided whether the waiver of Eleventh Amendment immunity solicited under the Act is valid under *College Savings* has reached precisely the same conclusion, on the same grounds, as the Seventh Circuit. In *MCI Telecomms. Corp.* v. *Public Service Comm'n*, 216 F.3d 929, 938 (10th Cir. 2000), the Tenth Circuit framed the question as follows: "Utah has voluntarily waived its immunity only if Congress, through the 1996 Act, threatened it with the denial of a gratuity, rather than the imposition of a sanction." In answering that question, the court first observed that although "Congress could have preempted all state regulation of local phone service," through the Act Congress only "preempted state regulatory authority over some aspects of local phone service." *Id.* (citing *AT&T Corp.*, 525 U.S. at 378 n.6). The court then explained that "with the passage of the 1996 Act, Congress essentially transformed the regulation of local phone service from an otherwise permissible state activity into a federal gratuity." *Id.* The court further noted that "[a]s in *Petty* and *Dole*, Congress

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consequence of accepting Congress' invitation to perform federal regulatory functions is consent to suit in federal court. Indeed, even the district court below, which ultimately (and erroneously) held that the Eleventh Amendment barred respondents' suits, concluded that the Act "provides clear notice to the states that their commissions will have to defend their rulings in federal court." Pet. App. 61a; see also *id.* at 89a (reaffirming that the Act "provides a clear warning" to state regulators). Every other court that has addressed the issue of which we are aware has reached the same conclusion. See, *e.g.*, *MCI Telecomms.*, 216 F.3d at 938 ("Congress has clearly expressed its intention that if a state elects to approve or reject an interconnection agreement, then it waives its sovereign immunity").

was under no obligation to allow states to participate in the Act's regulatory scheme." *Id.* On the basis of this analysis, which parallels the Seventh Circuit's analysis in every material respect, the court concluded that "by conditioning a state's ability to regulate local phone service on its consent to suit in federal court, Congress threatened the state with the denial of a gratuity rather than exclusion from an otherwise lawful activity." *Id.*

Petitioners (at 17-18) strain to manufacture a circuit split on the basis of *GTE North* v. *Strand*, 209 F.3d 909 (6th Cir.), cert. denied, 121 S. Ct. 380 (2000), but the Sixth Circuit's brief discussion of waiver, in a footnote (see *id.* at 922 n.6), was plainly dicta. The parties neither briefed nor argued a waiver theory in *GTE North*, because the district court's jurisdiction over the preemption claim in that case was not based on the 1996 Act, but rather on 28 U.S.C. § 1331. *GTE North*, 209 F.3d at 912.

Petitioners' suggestion (at 18) that the Second Circuit's decision in *Burnette* v. *Carothers*, 192 F.3d 52 (2d Cir. 1999), cert. denied, 69 U.S.L.W. 3296 (U.S. Dec. 11, 2000) (No. 00-610), creates a conflict in the circuits is even more far fetched. In *Burnette*, the appellants expressly relied on *Parden* v. *Terminal Ry.*, 377 U.S. 184 (1964), in contending that "Connecticut consented to suit in federal court under CERCLA by engaging in an activity regulated by Congress, namely the operation of a prison from which toxic chemicals were released." 192 F.3d at 60. As the Second Circuit properly held, such an argument was no longer tenable after this Court's decision in *College Savings*, which "expressly overruled" *Parden*. *Id.* *Burnette* thus presented an obvious example of a *Parden*-type waiver, which Congress sought to exact as the cost of participating in a regulated industry. Here, by contrast, the states are not the *regulated* actors, but rather are, if they choose

to be, the actual *regulators* under a new federal statutory scheme.

II. CONGRESS DID NOT VIOLATE THE TENTH AMENDMENT IN AUTHORIZING STATE OFFICIALS TO PERFORM DELEGATED FUNCTIONS AS VOLUNTARY DEPUTIZED FEDERAL REGULATORS.

The Tenth Amendment issue encompassed in petitioners' second question presented is not worthy of this Court's attention for several reasons.

A. To begin with, even if petitioners had a viable Tenth Amendment claim, this case would not be a suitable vehicle for examining that claim because neither of the courts below even addressed such a claim. Moreover, there is no circuit split on the question whether the scheme of cooperative federalism created by the Act comports with the Tenth Amendment. The only court of appeals to have addressed that question concluded that because state public utility commissioners "could have chosen not to participate" in the Act's regulatory scheme, "[t]he United States did not compel [the commissioners'] actions and, consequently, the Tenth Amendment does not bar Ameritech's suit." *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 868 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000).

B. In addition, although petitioners purport to object to the federal regulatory scheme on Tenth Amendment grounds, their claim has nothing to do with that amendment. The Tenth Amendment forbids Congress from requiring states to legislate or execute laws on the federal government's behalf. In short, the states may interpose the Tenth Amendment to bar attempts by the federal government to either "requir[e] the States to address particular problems" or "command the States' officers * * * to administer or enforce a federal regulatory program." *Printz* v. *United States*, 521 U.S. 898, 935 (1997). But

petitioners are not seeking an order enjoining their participation in the federal regulatory tasks set forth in the Act. Indeed, petitioners *want* to perform these regulatory tasks. What they object to is federal court review of their actions as deputized federal regulators.

C. In any event, this Court's decisions establish that the Tenth Amendment does not bar the federal government from offering the states the choice of regulating according to federal standards and procedures or not regulating at all. As this Court has made clear time and again, "where Congress has the authority to regulate private activity under the Commerce Clause * * * [Congress may] offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York* v. *United States*, 505 U.S. 144, 167 (1992). See also *FERC* v. *Mississippi*, 456 U.S. 742, 761-71 (1982); *Hodel* v. *Virginia Surface Mining & Reclam. Ass'n*, 452 U.S. 264, 288-89 (1981).

It is beyond question that Congress could preempt all state regulation of local telecommunications if it so chose. See *FERC*, 456 U.S. at 764 ("the commerce power permits Congress to pre-empt the States entirely in the regulation of private utilities"). Although Congress did not go that far in the Act, "[w]ith regard to the matters addressed by the 1996 Act," it "has taken the regulation of local telecommunications competition away from the States." *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999). Yet within this "new federal regime," Congress has invited state commissions to participate as deputized federal regulators — subject to the procedural and substantive requirements of the Act, the foremost of which is that the states must regulate in accordance with the requirements of federal law and "must hew" to the "lines" that Congress and the FCC have drawn. *Id.*

As this Court has expressly noted, this type of arrangement "is replicated in numerous federal statutory schemes" that have been upheld as "permissible method[s] of encouraging a State to conform to federal policy choices." *New York*, 505 U.S. at 167-68 (citing *Hodel*, 452 U.S. at 289). As *FERC* and *Hodel* established, and this Court's subsequent decisions have reaffirmed, Congress may indirectly "'coerc[e] the States' into assuming a regulatory role by affecting their 'freedom to make decisions in areas of integral governmental functions'" (*FERC*, 456 U.S. at 766), but it may not "directly compel[] [the States] to enact and enforce a federal regulatory program." *Hodel*, 452 U.S. at 288; see also *FERC*, 456 U.S. at 766 ("it cannot be constitutionally determinative that the federal regulation is likely to move the States to act in a given way"). In short, as long as each state "retain[s] the ultimate decision" as to whether it will accept the benefit offered by Congress (*New York*, 505 U.S. at 168), a conditional benefit such as that offered under the Act passes Tenth Amendment muster.

III. THE COURTS OF APPEALS UNIFORMLY HAVE HELD THAT THE FEDERAL COURTS HAVE JURISDICTION TO REVIEW STATE COMMISSION DETERMINATIONS ENFORCING PREVIOUSLY-APPROVED SECTION 252 AGREEMENTS.

A. Petitioners next question the Seventh Circuit's decision that federal courts have jurisdiction under section 252(e)(6) of the Act to review state commission determinations concerning previously-approved section 252 interconnection agreements. However, the federal courts of appeals uniformly have held that (i) state commissions are authorized under the 1996 Act to interpret and enforce section 252 interconnection agreements, and (ii) decisions interpreting and enforcing those agreements constitute "determinations under section 252." See, *e.g.*, *Southwestern Bell Tel. Co.* v. *Brooks Fiber Communications*,

2000 WL 1827576, at *3 (10th Cir. Dec. 13, 2000) (holding that under section 252(e)(6) of the Act, "[t]he district court * * * had jurisdiction to review the OCC's decision interpreting and enforcing the federally mandated Interconnection Agreement"); *Southwestern Bell Tel. Co.* v. *Connect Communications Corp.*, 225 F.3d 942, 947 (8th Cir. 2000) ("the state commission's power to enforce a federally-mandated interconnection agreement arises from § 252, and thus a state commission's decision enforcing the agreement is a 'determination' under that section" that is reviewable in federal court under section 252(e)(6)); *Southwestern Bell Tel. Co.* v. *Public Util. Comm'n*, 208 F.3d 475, 479-80, 481 (5th Cir. 2000) (noting that "the Act's grant to the state commissions of plenary authority to approve or disapprove these interconnection agreements necessarily carries with it the authority to interpret and enforce the provisions of agreements that state commissions have approved" and holding that "district courts have jurisdiction to review * * * interpretation and enforcement decisions of the state commissions"); *Illinois Bell Tel. Co.* v. *Worldcom Technologies, Inc.*, 179 F.3d 566, 570-71 (7th Cir. 1999) (noting that "subsection 252(e)(6) provides for judicial review of 'state commission actions,' not simply review of 'interconnection agreements'" and that "suits reviewing 'actions' by state commissions * * * were to be brought exclusively in the federal courts"), petitions for cert. filed, 69 U.S.L.W. ____ (Nov. 28, 2000) (No. 00-878) & 69 U.S.L.W. ____ (Nov. 28, 2000) (No. 00-921); Pet. App. 26a, 33a (holding that "[a] state commission's authority to approve or reject interconnection agreements under the Act necessarily includes the authority to interpret and enforce, to the same extent, the terms of those agreements once they have been approved by that commission" and that "Congress intended to provide for federal court review of any regulatory determination made under [section 252], whether by a state commission or, if the state commission chooses not to act, by the FCC acting in its

place"). See also *Puerto Rico Tel. Co.* v. *Telecomms. Reg. Bd.*, 189 F.3d 1, 9-10 (1st Cir. 1999) (holding that a state commission action constitutes "a 'determination' under § 252" and thus "fall[s] within the jurisdictional bounds of § 252(e)(6)," if the aggrieved party's complaint alleges "a substantial nexus between the commission's determination and an interconnection agreement").[3]

In view of the unanimity in the federal courts of appeals on this question, there is no need for this Court to review petitioners' third question.[4]

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[3] The FCC has reached precisely the same conclusions as the courts of appeals. *Starpower* ¶¶ 6, 9 (holding that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements" lies within "the states' 'responsibility' under section 252" and assuming jurisdiction over interpretation dispute subject to "judicial review of [its] findings" under section 252(e)(6)).

[4] To be sure, there is a vital and recurring dispute over whether federal courts have jurisdiction over a claim that a state commission determination concerning the rights and obligations of the parties to a section 252 interconnection agreement deviated from the plain terms of that agreement. Although one of the underlying claims in this case involves such a determination, the court of appeals had no occasion to reach the issue because the district court had dismissed the consolidated cases on Eleventh Amendment grounds. This important issue was squarely addressed, however, in *Illinois Bell*, 179 F.3d at 569-74, in which Ameritech has filed a petition for a writ of certiorari (No. 00-921) that remains pending. *Illinois Bell* is the appropriate vehicle for resolving that critical question that has divided the courts of appeals. Compare *Illinois Bell*, 179 F.3d at 573-74 (adopting bifurcated "allocation of authority," pursuant to which review of state commission determinations with respect to section 252 agreements encompassed in the same order is divided between federal and state courts) with *Brooks Fiber*, 2000 WL 1827576, at *4

IV. THE SEVENTH CIRCUIT'S HOLDING THAT THE PSCW COMMISSIONERS COULD BE SUED UNDER THE EX PARTE YOUNG DOCTRINE IS CONSISTENT WITH THE DECISIONS OF THIS COURT AND THE OTHER COURTS OF APPEALS.

A. Prior to the Seventh Circuit's decision in this case, two other federal courts of appeals had addressed the question whether an action seeking prospective relief against state officials, sued in their official capacities, for alleged violations of the federal Telecommunications Act of 1996 could be maintained under the *Ex parte Young* doctrine. In *Michigan Bell Tel. Co.* v. *Climax Tel. Co.*, 202 F.3d 862, 867 (6th Cir.), cert. denied, 121 S. Ct. 54 (2000), the Sixth Circuit answered that question in the affirmative, holding that such a suit "is a straightforward *Ex parte Young* case." As the Sixth Circuit explained, "[u]nder *Ex parte Young*, suits against state officials seeking equitable relief for ongoing violations of federal law are not barred by the Eleventh Amendment." *Id.* The court then noted that (i) the Commissioners approved and are responsible for ongoing enforcement of the interconnection agreement and (ii) Ameritech alleges that the obligations imposed by the agreement violate federal law and seeks equitable relief. *Id.* On this basis, the court concluded that "Ameritech has stated a claim against the Commissioners * * *

(rejecting *Illinois Bell* and adopting "more expansive view of federal jurisdiction" pursuant to which aggrieved party need not split claims between federal and state court); *Connect*, 225 F.3d at 947-48 (same); *Southwestern Bell*, 208 F.3d at 479-82 (same). See also *BellSouth Telecomms.* v. *MCIMetro Access Transmission Servs., Inc.*, 97 F. Supp. 2d 1363, 1376 n.10 (N.D. Ga. 2000) (noting the existence of a "circuit split concerning the scope of federal review" of challenges to state commission determinations "construing and enforcing" section 252 agreements).

for equitable relief from an ongoing violation of federal law," and "[u]nder *Ex parte Young*, Ameritech is entitled to proceed." *Id.* Subsequently, the Tenth Circuit reached precisely the same conclusion, expressly "adopt[ing] the Sixth Circuit's rationale and holding" that such an action is "'a straightforward *Ex parte Young* case.'" *MCI Telecomms. Corp.* v. *Public Serv. Comm'n*, 216 F.3d 929, 939 (10th Cir. 2000) (quoting *Michigan Bell*, 202 F.3d at 867), petition for cert. filed, 69 U.S.L.W. 3282 (Sept. 18, 2000) (No. 00-593). Accordingly, the only federal courts of appeals that have decided the question presented here are in full agreement with respect to the proper result and rationale.

B. The principal basis on which petitioners seek this Court's review is a purported conflict between the Seventh Circuit's decision and this Court's decision in *Seminole Tribe* v. *Florida*, 517 U.S. 44 (1996). As demonstrated below, the detailed remedial scheme that strictly limits the methods of judicial redress under the Indian Gaming Regulatory Act ("IGRA") in ways that are inconsistent with the judicial remedies available under *Ex parte Young* simply has no analog under the Telecommunications Act of 1996. The 1996 Act places no limitations at all on the remedies that a federal court may use in a section 252(e)(6) suit to ensure that the obligations imposed on incumbent LECs through interconnection agreements comport with the 1996 Act. *Ex parte Young* and the Act's judicial review provisions work together to effectuate Congress' manifest intent in the 1996 Act that state officials exercising federal regulatory power under the Act adhere to federal law. See *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

As this Court observed in *Seminole Tribe*, the IGRA imposes a duty on states to negotiate in good faith with Indian tribes concerning gaming on reservations, 25 U.S.C. § 2710(d)(3)(A), "in conjunction with" a very "carefully crafted and intricate remedial scheme" for limited enforcement of that

duty, *id.* § 2710(d)(7). *Seminole Tribe*, 517 U.S. at 73-74. For example, although IGRA authorizes a federal court to order a state to negotiate in good faith, 25 U.S.C. § 2710(d)(7)(B)(iii), the IGRA does not permit the court to enforce its own order with contempt sanctions, as it may do in normal circumstances. Instead, if a state flouts the court's order to negotiate, the court may only refer the matter to a mediator, who will consider proposed compacts submitted by the parties and choose the one that "best embodies the terms of the Act." *Id.* § 2710(d)(7)(B)(iv); see *Seminole Tribe*, 517 U.S. at 74. And, perhaps most important, under the IGRA a state will not be subject to judicial sanctions, such as contempt, even if it refuses to honor the compact selected by the mediator. In that event, "the only sanction * * * is that the mediator shall notify the Secretary of the Interior who then must prescribe regulations" governing gaming on the tribal lands at issue. *Seminole Tribe*, 517 U.S. at 74-75.

In addressing the Tribe's contention that jurisdiction over its suit was proper under the *Ex parte Young* doctrine, the Court in *Seminole Tribe* first expressly reaffirmed the vitality and importance of the *Ex parte Young* doctrine in "ensuring the States' compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14. As the Court explained, "an individual can bring suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Id.* And the Court stressed that *Ex parte Young* may be used to enforce state compliance with federal law *except* in the rare case in which (i) Congress has *specifically limited* the judicial remedies available against a state or its officials *and* (ii) those statutory limitations are *inconsistent* with the judicial remedies available against state officials under *Ex parte Young*. *Id.* at 71-72 & nn.14, 16. Applying this standard to the IGRA, the Court concluded that by confining the available remedies to a "quite modest set of sanctions," Congress had "strongly indicate[d] that [it] had no

wish to" permit the judicial remedies against state officials that would be available under *Ex parte Young*. *Id.* at 75-76.

Central to the holding in *Seminole Tribe*, therefore, was the fact that Congress placed express limits on the methods of judicial redress available to courts presented with a claim that a state had failed to comply with the IGRA. For that reason, allowing a party to use the federal courts to coerce a state into compliance with the IGRA through an injunction under *Ex parte Young*, backed by the threat of contempt in the event of disobedience, would have been inconsistent with the essentially non-coercive remedial scheme in the IGRA. But where Congress has not limited the available avenues of judicial redress, the post-*Seminole Tribe* decisions in the courts of appeals consistently have recognized the continuing applicability of the *Ex parte Young* doctrine. *E.g.*, *Ellis* v. *University of Kansas Med. Ctr.*, 163 F.3d 1186, 1198 (10th Cir. 1999) (allowing suit under *Ex parte Young* to proceed because 42 U.S.C. § 1981 contains "nothing that indicates a 'detailed remedial scheme' designed to limit or prevent potential remedies within the *Seminole Tribe* meaning"); *Marie O.* v. *Edgar*, 131 F.3d 610, 616 (7th Cir. 1997) (allowing suit under *Ex parte Young* to proceed because "[i]n contrast with *Seminole Tribe* * * * there is no explicit remedial scheme that provides only limited redress in federal court" for violation of Part H of the Individuals with Disabilities Education Act).

There is absolutely no tension, let alone inconsistency, between an *Ex parte Young* remedy and the Congressionally-prescribed remedy under the judicial review provisions in the 1996 Act. Unlike the situation in *Seminole Tribe*, permitting section 252(e)(6) suits to proceed under *Ex parte Young* would not "cast[] aside * * * limitations" that Congress intentionally created through "a detailed remedial scheme for the enforcement against a State of a statutorily created right." *Seminole Tribe*, 517 U.S. at 74. Contrary to petitioners'

contentions, there simply are *no* limitations in section 252(e)(6) on the remedies that a federal court may use to ensure that state officials performing federal regulatory functions under the Act comply with federal law. Section 252(e) simply instructs the federal court to review the state regulators' actions for compliance with the 1996 Act and, if those actions deviate from the Act, the court may fashion any appropriate relief needed to ensure that the officials "hew" to "the lines" drawn by the Act. *Cf. AT&T Corp.*, 525 U.S. at 378 n.6.

An *Ex parte Young* suit to ensure compliance with the 1996 Act is therefore fully consistent with the remedy that Congress prescribed. Indeed, it would be difficult to fashion a tighter fit between the remedy contemplated in the Act (a federal court order requiring that the agreement be modified to meet the requirements of the federal Act) and *Ex parte Young*'s core function of permitting "suit against a state officer in order to ensure that the officer's conduct is in compliance with federal law." *Seminole Tribe*, 517 U.S. at 71 n.14 (citing *Ex parte Young*). In short, as one district court recently noted, "the remedy provided for by statute [under the Act] and the remedy under *Young* are one and the same." *Bell Atlantic-Delaware, Inc.* v. *Global Naps South, Inc.*, 77 F. Supp. 2d 492, 501 (D. Del. 1999).

C. Petitioners also appear to suggest that the Seventh Circuit's decision conflicts with *Ex parte Young* itself. Petitioners' contentions are way off the mark. It is petitioners, not the uniform decisions of the courts of appeals, that misapprehend the *Ex parte Young* doctrine.

1. Under *Ex parte Young* and its progeny, even where the state itself is immune from suit in federal court, "a federal court, consistent with the Eleventh Amendment, may enjoin state officials to conform their future conduct to the requirements of federal law." *Quern* v. *Jordan*, 440 U.S. 332,

337 (1979). As many courts have observed, the doctrine is grounded in the Supremacy Clause and "ensures that state officials do not employ the Eleventh Amendment as a means of avoiding compliance with federal law." *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993). In *Ex parte Young* itself, the Court held that a state official whose conduct violates federal law may not be said to represent the state, and thus is stripped of his or her immunity, because the state is bound to follow federal law under the Supremacy Clause. 209 U.S. 123, 159-60 (1908). The doctrine thus permits federal courts to issue declaratory or injunctive relief "to end a continuing violation of federal law" by state officials and "to vindicate the federal interest in assuring the supremacy of that law." *Green* v. *Mansour*, 474 U.S. 64, 68 (1985).

This Court permitted actions to enjoin state officials acting in violation of federal law — which today might be called "*Ex parte Young* actions" in shorthand — long before *Ex parte Young* itself was decided. See *Georgia R.R. & Banking Co.* v. *Redwine*, 342 U.S. 299, 304-05 & n.14 (1952) (noting that the Court had "long held," prior to 1908, that injunctive actions against state officers could proceed consistent with the Eleventh Amendment and that *Ex parte Young*, merely "reexamined and reaffirmed" that principle); *Ex parte Young*, 209 U.S. at 167 (noting that "jurisdiction of this general character has * * * been exercised by Federal courts from the time of *Osborn* v. *Bank of United States*," a case decided in 1824). Indeed, federal courts have followed a longstanding practice of reviewing the actions of state public utility commissions pursuant to the rule of *Ex parte Young*. See, *e.g.*, *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341, 344 n.4 (1951). And this Court's recent decisions have reaffirmed the vitality of the *Young* doctrine.

Just last Term in *Alden* v. *Maine* the Court stated that "suits for declaratory or injunctive relief against state officers must * * * be permitted if [federal law] is to remain the supreme law of the land," and thus the *Ex parte Young* doctrine is an "essential * * * part of our sovereign immunity doctrine." 527 U.S. 706, 747-48 (1999); see also *id.* at 757.[5] Under this Court's decisions, to determine whether jurisdiction is available under *Ex parte Young*, federal courts need only conduct a "straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective." *Coeur d'Alene Tribe*, 521 U.S. at 296 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment); see also *id.* at 298-99 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) (endorsing the same two-part test). Ameritech's claims here easily meet this test, because Ameritech (i) alleges that the commissioners required the inclusion of certain provisions as part of an approved interconnection agreement

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[5] And two Terms earlier, all nine Justices reaffirmed "the continuing validity of the *Ex parte Young* doctrine." *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 269 (1997); see also *id.* at 281 ("[a]n allegation of an on-going violation of federal law where the requested relief is prospective is ordinarily sufficient to invoke [*Ex parte Young*]"); *id.* at 293 (O'Connor, J., concurring in part and concurring in the judgment) ("When a plaintiff seeks prospective relief to end an ongoing violation of federal rights, ordinarily the Eleventh Amendment poses no bar"); *id.* at 297 (Souter, J., joined by Stevens, Ginsburg, and Breyer, JJ., dissenting) ("in the absence of some congressional limitation a federal court may entertain an individual's suit to enjoin a state officer from official action that violates federal law"). As Justice O'Connor stated, the *Ex parte Young* doctrine remains a "basic principle of federal law" that reflects "the importance of having federal courts open to enforce and interpret federal rights." *Id.* at 293 (O'Connor, J., joined by Scalia and Thomas, JJ., concurring in part and concurring in the judgment).

that imposes prospective, binding obligations on Ameritech and that the mandated inclusion and enforcement of those provisions and obligations is inconsistent with federal law and (ii) seeks equitable relief from those allegedly unlawful obligations. Pet. App. 16a-18a; see also *id.* at 48a.

2. Petitioners suggest that the Seventh Circuit's decision conflicts with *Ex parte Young* itself in several respects. This suggestion is plainly wrong.

First, petitioners assert that in permitting the respondents' lawsuits to go forward, the Seventh Circuit has violated the rule that "relief cannot be against the state when it is the true party in interest." Pet. 27. Petitioners' contention misreads this Court's precedents, which clearly hold that the State is *not* the real party in interest in a suit against a state official in his or her official capacity. Petitioners cite *Pennhurst State School & Hospital* v. *Halderman*, 465 U.S. 89, 101 (1984), but that case expressly noted that "a suit challenging the constitutionality of a state official's action is *not one against the State*. This was the holding in *Ex parte Young* * * *." *Pennhurst*, 465 U.S. at 102 (emphasis added). Since *Pennhurst*, this Court consistently has reaffirmed that "[i]n an injunctive or declaratory action grounded on federal law, the State's immunity can be overcome by naming state officials as defendants," and "official-capacity actions for prospective relief *are not treated as actions against the State.*" *Kentucky* v. *Graham*, 473 U.S. 159, 169 n.18, 167 n.14 (1985) (emphasis added). See also *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989); *Futernick* v. *Sumpter Twp.*, 78 F.3d 1051, 1055 (6th Cir. 1996) ("state officers who are violating a federal law may always be sued for purely injunctive relief — 'capacity' and 'party in interest' are irrelevant").

Second, petitioners contend that allowing respondents to proceed under *Ex parte Young* runs afoul of the requirement

that "relief must be prospective in nature to address an ongoing violation." Pet. 27. Petitioners' suggestion that their orders have no "ongoing" effects and, at most, constitute past violations of federal law is simply wrong. Under section 252, if the parties cannot agree on what terms and conditions are required by the Act, state public utility commissioners step in as *regulators* and "impos[e] appropriate conditions as required to implement" the federal Act. 47 U.S.C. §§ 252(b)(4)(C) and 252(c)(1). The state officials then require the parties to put those obligations into an interconnection agreement prior to seeking final approval. 47 U.S.C. § 252(e)(1). In performing these functions, petitioners exercised *coercive regulatory power*, and what resulted from their exercise of that power was a carrier-specific government regulation that is legally binding on the parties unless and until it is set aside by a federal court pursuant to section 252(e)(6).

Moreover, the "ongoing" legal consequences of the Commissioners' orders are not confined to the parties to the agreement. Under section 252(i) of the Act, the terms and conditions that the Commissioners imposed on Ameritech in the Climax agreement are available to any other carrier that requests them. Under these circumstances, it is simply undeniable that the interconnection orders that Ameritech is challenging here have "ongoing" legal consequences. Indeed, it is well established that an official capacity action against a state official may proceed under *Ex parte Young* even if the violation arises from past conduct, provided that the unlawful effects are ongoing and the relief sought acts prospectively. *Papasan* v. *Allain*, 478 U.S. 265, 282 (1986) (*Ex parte Young* action available to correct unlawful disparity in school funding resulting from past disposition of public lands). As the Fourth Circuit recently explained, "a future injunction is not made retrospective merely because it recognizes that an ongoing violation of law is the result of a past wrong." *CSX Transp.*,

Inc. v. *Board of Pub. Works*, 138 F.3d 537, 541 (4th Cir. 1998) (upholding an injunction against future collection of illegal taxes, even those that already had been assessed, as prospective relief under *Ex parte Young*).

Third, petitioners suggest that an *Ex parte Young* action would improperly interfere with the exercise of state agency discretion relating to the arbitration and approval or rejection of interconnection agreements. Pet. 29-30. Contrary to petitioners' suggestion, they *do* have a duty to comply with the numerous substantive and procedural requirements imposed by federal law. *Alden* v. *Maine*, 527 U.S. 706, 755 (1999) ("The States and their officers are bound by obligations imposed by the Constitution and by federal statutes that comport with the constitutional design"). Once petitioners opted to participate in the arbitration and approval process under the Act, they were duty bound to ensure that the interconnection agreement they imposed on Ameritech comported with federal law. Simply put, under the Supremacy Clause, petitioners have no discretion to violate federal law when discharging their duties under the Act. As this Court held in *Ex parte Young* itself, state officials' "general discretion regarding the enforcement of the laws * * * is not interfered with by an injunction which restrains the state officer from taking any steps toward the enforcement of an unconstitutional enactment, to the injury of the complainant." *Ex parte Young*, 209 U.S. at 159. As the Court explained, "[a]n injunction to prevent [a state official] from doing that which he has no legal right to do is not an interference with the discretion of an officer." *Id.*; see also *Poindexter* v. *Greenhow*, 114 U.S. 270, 290 (1885) ("the distinction between the government of a state and the state itself is important, and should be observed"); *id.* ("whatever wrong is attempted in [the] name [of the state] is imputable to its government, and not to the state, for, as [the state] can speak and act only by law, whatever it does say and do must be lawful"). Where, as here, a complaint properly

alleges that state officials have committed ongoing violations of federal law, petitioners' reliance on the concept of discretion is misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

PUBLIC SERVICE COMMISSION OF WISCONSIN, ET AL.
Petitioners,

v.

WISCONSIN BELL, INC., D/B/A AMERITECH WISCONSIN, ET AL.
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

AMICI CURIAE BRIEF OF THE STATE COMMISSIONS OF MISSOURI, UTAH, KENTUCKY, MONTANA, MAINE, NORTH CAROLINA, PENNSYLVANIA, NEVADA, KANSAS, MARYLAND, MICHIGAN, VIRGINIA, AND NEW HAMPSHIRE, AND OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS SUPPORTING PETITIONERS

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INTEREST OF THE *AMICI*

The Missouri Public Service Commission, Public Service Commission of Utah, Kentucky Public Service Commission, Montana Public Service Commission, Maine Public Utilities Commission, North Carolina Utilities Commission, Pennsylvania Public Utility Commission, Public Utilities Commission of Nevada, Kansas Corporation Commission, Maryland Public Service Commission, Michigan Public Service Commission, Virginia State Corporation Commission, New Hampshire Public Utilities Commission, and National Association of Regulatory Utility Commissioners (hereinafter "*Amici*") submit this brief in support of Petitioners Public Service Commission of Wisconsin and Cheryl L. Parrino, Daniel L. Eastman and Joseph P. Mettner, and their respective successors, in their official capacities as Commissioners of the Public Service Commission of Wisconsin. Counsel has obtained the written consent of all parties to this proceeding to file this brief on behalf of the Missouri Public Service Commission. All other *Amici* later joined in the filing of this brief.

The *Amici* Commissions are administrative agencies with broad regulatory authority over public utility companies, including regulatory jurisdiction with respect to intrastate operations of telecommunications carriers. *Amicus* National Association of Regulatory Utility Commissioners is the national organization of Commissioners of the *Amici* Commissions and other state public utility commissions. Each of the State agency *Amici* is a "State commission" under section 252 of the federal Telecommunications Act of 1966 (the "Act").[1] The instant case involves the sovereign immunity of State commissions and the immunity of the

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[1] 47 U.S.C. § 252; 47 U.S.C. § 153(41) (defining "State commission" as "the commission, board, or official (by whatever name designated) which under the laws of any State has regulatory jurisdiction with respect to intrastate operations of carriers.").

individual commissioners who serve on these State commissions. Thus, the *Amici* have a vital interest in the ultimate outcome of the instant case.

An additional interest is that State commissions across the country are allocating scarce resources to challenge federal court jurisdiction in pending section 252(e)(6) actions under the Act. Granting the petition and issuing a decision in the instant case will provide necessary direction to resolve these important jurisdictional disputes and allow the courts, State commissions and carriers to turn their attention to substantive disputes arising from interconnection agreement determinations made by State commissions.

In support of Petitioners' request for a writ of certiorari, this brief contains new arguments not heretofore advanced by the parties in this case.

SUMMARY OF THE ARGUMENT

The court below erred in two primary respects in holding that State commissions, and States, waive their sovereign immunity by continuing their traditional intrastate regulation of telecommunications carriers and services since enactment of the Telecommunications Act of 1996. First, the court failed to analyze whether the purported waiver was voluntary, as required by this Court's decision in College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 527 U.S. 666 (1999). In place of analysis, the court below substituted a one-sentence conclusion that "states voluntarily waive their sovereign immunity by accepting that invitation" to regulate the local market under section 252 of the Act. MCI Telecommunications Corp. v. Illinois Bell Telephone Co., 222 F.3d 323, 342 (7th Cir. 2000). Under College Savings Bank, the court was obliged to consider the voluntariness of the purported waiver. Mere

reference to "acceptance" of an "invitation" to regulate does not suffice under a long line of decisions of this Court. The court below also failed to consider that before it was a constitutional right, guaranteed to the States by the Eleventh Amendment, and that waivers of constitutional rights are not so readily found, without a far more detailed analysis of the surrounding circumstances.

Second, the court stretched the reach of section 252(e)(6) beyond its plain words, in contravention of the very principles the court had enunciated. Rather than abiding by the maxims that congressional intent to exact waivers of Eleventh Amendment immunity must be "unequivocal" and that the court must "'indulge every reasonable presumption against' a state's waiver of immunity," the court applied section 252(e)(6) to a broad range of everyday State commission deliberations and interpreted it to exact waivers of sovereign immunity when State commissions engage in review, enforcement and other post-approval determinations. 222 F.3d at 337. Not only was this extension of the statute error, but its breadth creates unwarranted dilemmas for State commissions and federal courts every time issues arise with respect to interconnection agreements, no matter how far distanced from any concern expressed in section 251 or section 252 of the Act. The decision below also broadly expands federal courts' roles in reviewing State administrative decisions and subjects these decisions to four years of uncertainty, all without rationale in the Act.

ARGUMENT

I. THE COURT ERRED IN FAILING TO ASSESS AND TO ASCERTAIN THE VOLUNTARINESS OF THE PURPORTED WAIVER OF SOVEREIGN IMMUNITY

In College Savings Bank, this Court acknowledged three fundamental principles governing the waiver issue. First, the waiver must be "altogether voluntary." 527 U.S. at 675, 681, quoting Beers v. Arkansas, 20 How. 527, 529, 15 L. Ed. 991 (1858). Second, "[c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights." 527 U.S. at 681, quoting Edelman v. Jordan, 415 U.S. 651, 673 (1974).[2] Third, inducements "may be so coercive as to pass the point at which 'pressure turns into compulsion.'" 527 U.S. at 687, quoting South Carolina v. Dole, 483 U.S. 203, 211 (1987).

In the instant case, the court below failed to apply these principles. In contrast to the analysis of the Wisconsin district court decision that the court of appeals reversed, Wisconsin Bell, Inc. v. Public Service Comm'n of Wisconsin, 57 F. Supp.2d 710 (W.D. Wis. 1999), the court below simply equated what it viewed as States' acceptance of the "invitation" to regulate intrastate telecommunications

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[2] This Court went on expansively to quote other decisions, in pertinent part, as follows:

> The classic description of an effective waiver of a constitutional right is the "intentional relinquishment or abandonment of a known right or privilege." ... [W]e "do not presume acquiescence in the loss of fundamental rights" ... State sovereign immunity, no less that the right to trial by jury in criminal cases, is constitutionally protected.

527 U.S. at 682 (citations omitted).

with voluntariness. But acceptance alone is not the same as voluntary acceptance. Indeed, the mere fact of acceptance begs the question of whether the acceptance, i.e. the waiver, was voluntary. Acceptance is the starting point of the analysis, not the finish line. Acceptance or acquiescence might, just as readily, be involuntary as voluntary. Once the court finds that the possessor of the constitutional right has relinquished that right, then the court must examine the "totality of the circumstances" in order to determine whether that relinquishment was voluntary or coerced. See, e.g., Arizona v. Fulminante, 499 U.S. 279, 285-88 (1991). Waiver without detailed consideration of the context is, at best, voluntary only by happenstance.

This test required the court to assay the participation of the public service commissions of Illinois and Wisconsin in the Act's regulatory scheme from the commissions' view, and not merely look to the statute as ipso facto determinative of whether the commissions' regulation constituted a voluntary waiver of the states' constitutional right. See, e.g., United States v. Mendenhall, 446 U.S. 544, 558 (1980). The party claiming voluntary waiver, not the party claiming the constitutional right, bears the burden of proof. Id. at 557.

The court below, unlike the district court, failed to engage in this mandatory analysis, relying solely on the fact of State commission regulation. In essence, the court of appeals' conclusory logic is tautological: The States' acceptance of the "invitation" to regulate, according to the lower court's analysis, itself makes the acceptance voluntary. The court clearly reached its conclusion improperly. Had the Seventh Circuit properly analyzed the "totality of the circumstances," it well could have, and *Amici* submit should have, reached the same decision as did the district court.

What the Seventh Circuit did was reinstate fully the concept of constructive waiver of a constitutional right,

which this Court significantly narrowed, if not eliminated, in College Savings Bank. Reincarnating constructive waiver, where mere acquiescence suffices, vitiates the separate requirement of voluntariness and will allow "gun to the head" coercion to induce waiver of constitutional rights.

The court below did not limit its resuscitation of constructive waiver to eliminating consideration of voluntariness. The court was faced also with the issue of whether, and how, a State commission, wholly lacking the power or authority to waive a State's sovereign immunity, could waive that immunity by regulating intrastate telecommunications. The court gave this argument only passing, footnote consideration. 222 F.3d at 344 n. 10. In doing so, the court grafted another form of constructive waiver onto jurisprudence disfavoring constructive waiver. The court reasoned that since neither Illinois nor Wisconsin had taken any steps to forbid their respective commissions from exercising their authority over intrastate telecommunications, the States themselves, not the commissions, had waived their immunity.

The court did not suggest that the respective State legislatures' failure to act was the requisite clear, unequivocal and unambiguous expression of waiver. Any such suggestion, had it been made, clearly would have been wrong. Instead, in the place of the required clarity and certainty, the court was forced to substitute constructive waiver by default, a basis for waiver without foundation and without legal support.

II. THE COURT ERRED IN OVEREXTENDING SECTION 252 (e)(6) TO REVIEW AND ENFORCEMENT OF ORDERS, WHERE WAIVER OF SOVEREIGN IMMUNITY AND CONSTANT FEDERAL COURT INTERVENTION ARE UNWARRANTED

The Seventh Circuit cited two principles to guide its determination of whether State commissions waive sovereign immunity under section 252(e)(6). First, the court "'indulge[s] every reasonable presumption against' a state's waiver of immunity." 222 F.3d at 338, quoting College Savings Bank. Second, "[w]hen it intends to obtain a waiver of immunity from the states, Congress must 'speak with a clear voice' so that the states may exercise their choice to waive their immunity 'knowingly, cognizant of the consequence of their participation.'" 222 F.3d at 340, quoting Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1, 17 (1981). That is, there must be "an unequivocal expression of congressional intent" to obtain a waiver of States' constitutional immunity. Regrettably, the court failed to follow either of these principles when the court extended the reach of section 252(e)(6) well beyond its plain, unequivocal words.

The pertinent sentence of section 252(e)(6) reads as follows: "In any case in which a State commission makes a determination under this section, any party aggrieved by such determination may bring an action in an appropriate Federal district court to determine whether the agreement or statement meets the requirements of section 251 of this title and this section." The "unequivocal expression" in this section is that federal court review is limited to a determination of whether an interconnection agreement or statement of generally available terms complies with sections 251 and 252. Presumably, this sentence may be extended to

instances after initial approval (and any judicial review) in which material terms of the agreement or the statement are altered.

However, there is nothing in section 252 indicating that Congress, or the Federal Communications Commission, believed that garden-variety administrative agency oversight and enforcement by State commissions was intended, unequivocally, to constitute a waiver of sovereign immunity. These post-approval proceedings, whether initiated on carrier complaints, citizen complaints or agency review, and whether formal or informal, are common to State commissions and may be the bread-and-butter of the administrative process. By its expansive interpretation of section 252 (e)(6), the Seventh Circuit essentially federalized these standard State commission proceedings. *Amici* submit that it simply is not correct to read section 252(e)(6) consistently with the foregoing applicable principles regarding waiver of sovereign immunity and to reach the Seventh Circuit's conclusion that this section confers jurisdiction on federal courts to review oversight, enforcement and other post-approval determinations made by State commissions. 222 F.3d at 337-38.

The result of this decision is to leave State commissions with a threshold decision each time they are asked to review, or each time public policy compels review of, an interconnection agreement, a statement of generally accepted terms or the conduct of the providers operating under either an agreement or a statement. This is a particular concern when the State commission is duty bound to regulate in the public interest or as a matter of public policy for its citizens. On each such occasion, State commissions must ask themselves if the prospect of waiver of the State's sovereign immunity and the prospect of federal court litigation are prices worth paying in exchange for the exercise of the commissions' traditional oversight of

intrastate telecommunications services and providers. This repeated threshold decision is not the type of decision-making on which Congress intended State commissions to expend their resources and efforts.

This error is compounded by the Seventh Circuit's determination to apply Ex parte Young, 209 U.S. 123 (1908), to every State commission consideration of an existing agreement or statement. To an unprecedented and unnecessary extent, and without consideration of the extraordinary breadth of its decision, the Seventh Circuit cast the shroud of personal suits in federal court on every State commissioner every time a commission considers an issue raised under or with respect to a previously approved agreement or a statement. There is no doubt that the Seventh Circuit decision will bring a grave chill to State commissions' regulation of intrastate telephone services and providers, and do so without any "clear voice," "unequivocal expression" or "unambiguously" stated condition that this is what Congress intended. 222 F.3d at 340, 341.

Nor is there anything in the Act denoting a legislative or administrative intention that federal courts were to assume the traditional administrative review role of state courts in appeals from ordinary administrative oversight of intrastate telecommunications services and providers. What the Seventh Circuit decision does is convert the federal district courts into state appellate courts in every instance where a State commission proceeding touches on an issue previously part of an interconnection agreement or statement of generally available terms. That conversion not only is unwarranted by the Act, but also adds another layer of review to every State commission decision. Instead of the normal state appellate review as the immediate first step after the administrative decision, federal court review starts in the district court and only thereafter goes to an appellate court.

The Seventh Circuit decision also brings major uncertainty to the integrity of everyday State commission review and enforcement decisions that cannot be reconciled with the Act. In ordinary State court review of decisions of State commissions, aggrieved parties have finite periods of time, generally 30-60 days, within which to take their appeals or be forever barred. But under section 252(e)(6), according to lower court decisions elsewhere, the general four-year federal statute of limitations governs. 28 U.S.C. § 1658. Thus, every decision emanating from an interconnection agreement or statement, no matter how localized, no matter how attenuated from the determination to approve or reject an agreement or statement, is subject to federal court challenge for four years. In the fast-paced world of telecommunications, leaving the federal court doors open for four years to review local decisions is not only unwarranted, but also extremely unwise.

The decision leaves State commissions with the choice to regulate or abstain in order to preserve sovereign immunity. While it may be argued, as the carriers successfully argued below, that section 252 expressly contemplates that choice with respect to determinations to approve or reject agreements or statements, the same cannot be said of the ordinary, day-to-day regulation of telephone companies. Unlike approval or rejection of an agreement or statement, there is no section 252(e)(5) fallback to the Federal Communications Commission if a State commission declines a request from a provider or a user to review conduct under a previously approved agreement or statement. Alternatively, if a court were to read into section 252(e)(5) a requirement that the FCC preempt State commission jurisdiction every time a State commission failed to act on a complaint concerning a previously approved agreement or statement, the FCC would have to perform the functions of 50 separate State commissions. That Congress intended the FCC to assume this role is not

apparent in the Act. Indeed, the primary role of the States, continuing their traditional regulation under the Act, belies this intention.

In sum, the decision below does not "'indulge every reasonable presumption against' a State's waiver of immunity." Instead, the court relied on a series of presumptions in favor of waiver, leading, therefore, to its inexorable conclusion that by engaging in any consideration of conduct under an approved agreement or statement, no matter how limited or unrelated to the prior approval, the State commissions waive State sovereign immunity and subject the individual commissioners to suit in federal court. *Amici* respectfully submit that the decision is contrary to the words and intent of the Act, contrary to judicial precedent and contrary to sound logic.

CONCLUSION

For the foregoing reasons, the Court should grant the petition of the Public Service Commission of Wisconsin and Commissioners Cheryl L. Parrino, Daniel L. Eastman and Joseph P. Mettner for a writ of certiorari.

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